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REPORTS

OF

CASES

DETERMINED AT

NISI PRIUS,

IN THE COURTS OF

King's Bench and Common Pleas,

AND ON

THE CIRCUIT,

FROM THE

Sittings in EASTER TERM, 51 GEO. III. 1811,

TO THE

Sittings after HILARY TERM, 54 GEO. III. 1814.

BOTH INCLUSIVE.

BY JOHN CAMPBELL ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

Si de interpretatione legis quæratur; in primis inspiciendum est, quo jure civitas retro in ejusmodi casibus usa fuisset. PAND. L. L. t. 3.

VOL. III.

LONDON:
PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH AND SON, FLEET-STREET, AND
J. COOKE, ORMOND-QUAY, DUBLIN.
1814.

JUN 27 1901

A

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The Attorney and Solicitor General to have precedence above all the King's Serjeants.

In the name and on the behalf of His Majeſty.

GEORGE P. R.

WHEREAS Our Attorney and Solicitor General now have place and audience in Our Courts next after the two ancienteſt of Our Serjeants at Law for the time being, and before Our other Serjeants at Law; We, conſidering the weighty and important affairs in which Our Attorney and Solicitor General are employed in Our behalf, and in which the Attorney and Solicitor General of Us, Our Heirs and Succeſſors, may hereafter be employed; do hereby ordain and direct, That at all times hereafter the Attorney and Solicitor General of Us, Our Heirs and Succeſſors, ſhall have place and audience, as well before the ſaid two ancienteſt of Our Serjeants at Law, as alſo before every perſon who now is one of Our Serjeants at Law, or hereafter ſhall be one of the Serjeants at Law of Us, Our Heirs or Succeſſors: And We do hereby will and require you not only to cauſe this Our direction to be obſerved in Our Court of Chancery, but alſo to ſignify to the Judges of all Our other Courts at Weſtminſter, that it is Our expreſs pleaſure that the ſame courſe be obſerved in all Our ſaid Courts.

Given at Our Court at Carleton Houſe, this fourteenth day of December, in the fifty-fourth year of His Majeſty's reign.

By command of His Royal Highneſs the Prince Regent, in the name and on the behalf of His Majeſty.

SIDMOUTH.

To the Right Hon. John Lord Eldon,
Our Chancellor of Great Britain.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Easter Term,

51 GEORGE III.

THIRD SITTINGS IN TERM AT GUILDHALL.

1811.

Wednesday, May 22.

WEBBER *v.* ROBERT MADDOCKS.

A. and B. for a a debt due to C. agree to give him a bill of exchange to be drawn by A. and accepted by B.—Instead of this, they send him a promissory note made by the one and indorsed by the other, which he immediately returns to be altered into a bill of exchange according to the agreement.—The instrument so altered is a valid bill of exchange, without a fresh stamp, as it had not been negotiated in the shape of a promissory note, and the alteration may be considered as the mere correction of a mistake.

THIS was an action against the defendant as acceptor of a bill of exchange for 110*l.* dated 10th December 1810, drawn by Samuel Maddocks, payable to his own order at four months after date, and indorsed by him to the plaintiff.

The defence was, that the instrument declared upon had been altered materially after it had been negotiated, and that it was therefore void for want of a fresh stamp.

1811.

WEBBER v. MADDOCKS.

It appeared that Samuel and Robert Maddocks being indebted to the plaintiff in the ſum of 110*l.* they agreed to give him a bill of exchange at four months for this amount to be drawn by Samuel and accepted by Robert. Inſtead of a bill of exchange, they ſent him a promiſſory note in the following form:

"London, 10th December 1810.
"Four months after date I promiſe to pay to my own "order one hundred and ten pounds value received.
"S. Maddocks.
(Indorſed) "S. Maddocks.
"R. Maddocks."

The plaintiff was diſſatisfied with the ſecurity in this form, and returned it that it might be altered into a bill of exchange according to the agreement. The words "*I promiſe to*" were immediately ſtruck out, a direction to R. Maddocks was ſubjoined, and he wrote his name as acceptor of the bill. It was then delivered back to the plaintiff.

Marryat for the defendant inſiſted that the inſtrument was completely vitiated by the alteration. It had exiſted and had been iſſued as a perfect promiſſory note, on which both the parties were liable. The ſtamp attached to the promiſſory note. The bill of exchange into which that was afterwards converted, was therefore without a ſtamp and void.

Lord ELLENBOROUGH.—I think the ſtamp impreſſed upon this paper is ſufficient to render the in-

ſtrument available in its preſent form. It cannot be conſidered as having been negotiated as a promiſſory note. It never was iſſued to third perſons. It remained in the hands and under the dominion of the original parties. Every thing continued *in fieri* till after the alteration. The ſtamp was not occupied till then. Webber inſtantly rejected it as a promiſſory note. The alteration only fulfilled the terms of the agreement, and may be treated as the correction of a miſtake. There was a caſe ſome time ago before Mr. JUSTICE LE BLANC which was ſtronger than this, and where the inſtrument was held to be valid in its altered form. We had likewiſe recently occaſion to conſider this ſubject in a caſe upon the regiſter of a ſhip (*a*), and the court was of opinion that unleſs the inſtrument in its original form was valid and effectual, it may be altered, without a freſh ſtamp, according to the prior contract between the parties.

The plaintiff recovered.

Comyn for the plaintiff.

Marryat for the defendant.

[Attornies, *Gaines* and *Hall*.]

(*a*) Cole v. Parkin, 12 Eaſt, 471.— *Vide* Cordwell v. Martin, 1 Campb. 79. Marſon v. Petit, 1 Campb. 82. n.

ADJOURNED SITTINGS AT WESTMINSTER.

1811.

Thurſday, May 30.

DEAN *v.* KEATE ESQ.

If upon a hired horſe being taken ill, the hirer calls in a farrier, he is not anſwerable for any miſtakes which the latter may commit in the treatment of the horſe: but if inſtead of that he precribes for the horſe himſelf, and from unſkilfulneſs gives him a medicine which cauſes his death, although acting *bonâ fide*, he is liable to the owner of the horſe as for groſs negligence,

THIS was an action for the improper treatment of a horſe, let to hire by the plantiff to the defendant.

The defendant jobbed a pair of coach horſes of the plantiff. One of them being ſlightly indiſpoſed, the defendant wrote a preſcription for him. This medicine was not of itſelf calculated to do any injury; but after the horſe had ſwallowed it, the defendant put him into harneſs, gave him ſtrong exerciſe, and kept him expoſed to the inclemency of the weather. In conſequence of this treatment, the animal was ſeized with an inflammation in the inteſtines. The defendant then, without conſulting a veterinary ſurgeon, very imprudently preſcribed a ſtimulating doſe of opium and ginger, and the horſe ſoon after taking it died in great agony. Medical advice was called in when it was too late.

Park for the defendant cited the ſubjoined caſe of *Cooper v. Barton* before Mr. JUSTICE LE BLANC; and contended that the action could not be maintained, as the defendant had at moſt been guilty only of an error in judgment, and had treated the plaintiff's horſe exactly

exactly as he would have treated his own. It would be very alarming if those who job horses were answerable for the effect of medicines which it might appear proper to administer to them.

Lord ELLENBOROUGH. — The question is, whether the defendant has been guilty of gross negligence with respect to the horse. Had he called in a farrier, he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff.

The plaintiff had a verdict for 60 guineas.

Garrow and *Best* for the plaintiff.

Park and *A. Moore* for the defendant.

[Attornies, *Stokes* and *Bleasdale*.]

Cooper v. Barton. Lent Assizes, 1810. Lancaster. Cor. LE BLANC, J.

Assumpsit for not taking proper care of a horse hired by defendant of plaintiff.

In an action for not taking proper care of a hired horse, whereby his knees were broken, the plaintiff must give some positive evidence of negligence; and it is not enough to prove that the animal was returned by the defendant with his knees broken, although he had often been let out to hire before without having fallen down.

1811.

COOPER v. BARTON.

The plaintiff proved the hiring of the horſe; that it was returned to him with his knees broken in conſequence of a fall whilſt uſed by the defendant, and that the horſe had before that time been often let out to hire, and had never fallen down.

Park for the plaintiff contended that this was a ſufficient caſe to go to the jury, although he had given no evidence of negligence, becauſe as he had ſhewn that the horſe was a good horſe and not in the habit of falling, it muſt be preſumed that the fall was occaſioned by negligence, and it was for the plaintiff to prove the contrary if he could.

LE BLANC, J., however, ſaid that the plaintiff muſt give *ſome* evidence of negligence, and as he had given none in this caſe, the plaintiff muſt be nonſuited.

In Coggs v. Bernard, 2 Ld. Raym. 916, it is laid down by Lord HOLT, "that if goods are let out for a reward, the hirer is bound to the *utmoſt* diligence, ſuch as the *moſt diligent* father of a family uſes;" and in Bul. N. P. 72, it is ſaid, "that the hirer is to take *all imaginable* care of the goods delivered to hire." According to this doctrine, he would be anſwerable for *ſlight* negligence. But on a review of all the authorities upon the ſubject, it will be found that this extraordinary care is required only of a *borrower*, and that from the true conſtruction of the contract of *locatio conductio rei*, the *hirer* is required to uſe no more than that degree of diligence, which *prudent men*, that is, the *generality of men*, uſe in keeping *their own* goods. "If *Caius* therefore hire a horſe, he is bound to ride it as moderately and treat it as carefully as any man of *common diſcretion* would ride and treat *his own* horſe." See Jones on Bailm. 86.

DOE

1811.

Thurſday, May 30.

Doe d. Griffin *v.* Mason.

In ejectment upon the aſſignment of a term to ſecure an annuity, a proper memorial of the annuity deeds will be preſumed till the contrary is ſhewn.

EJECTMENT for certain leaſe-hold premiſes in *Chandos Street*, brought upon the aſſignment of a term by the defendant to the leſſor of the plaintiff, to ſecure the payment of an annuity.

A. Moore for the defendant inſiſted that the leſſor of the plaintiff was bound to prove that the annuity had been duly inrolled in purſuance of 17 Geo. 3. c. 26. as this aſſignment and all the annuity deeds were otherwiſe utterly null and void.

Lord Ellenborough. — If the annuity was not duly inrolled, that proof ſhould come from the other ſide. Here is an aſſignment executed by the defendant. I will preſume it to be valid till the contrary is ſhewn.

The leſſor of the plaintiff had a verdict.

Lawes for the leſſor of the plaintiff.

A. Moore for the defendant.

[Attornies, *Robinſon* and *Eaſterbrooke.*]

1811.

Thurſday May 30.

DOE d. LEESON *v.* SAYER.

The vendor of a term, before the whole of the purchaſe money is paid, agrees with the purchaſer that the latter ſhall have poſſeſſion of the premiſes till a given day, paying the reſerved rent in the mean time, and that if he does not pay the reſidue of the purchaſe-money on that day, he ſhall forfeit the inſtalments already paid and ſhall not be entitled to an aſſignment of the leaſe.—The purchaſer being thus put into poſſeſſion, if the reſidue of the purchaſe-money is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit or demand of poſſeſſion.

EJECTMENT. Demiſe laid on 27th March laſt.

Leeſon had bargained with the defendant to ſell him the remainder of a term. The defendant had paid part of the purchaſe-money; but on the 25th of December 1809, 131*l.* remained unpaid. On that day the parties entered into an agreement that the defendant ſhould have poſſeſſion of the premiſes till the 24th of June following, paying the reſerved rent of 106*l.* 10*s.* a-year, and that if he did not pay the reſidue of the purchaſe-money on or before the ſaid 24th day of June, he ſhould forfeit the inſtalments already paid, and ſhould not be entitled to an aſſignment of the leaſe. In fact the remainder of the purchaſe-money was never paid.

Jervis inſiſted for the defendant that under theſe circumſtances he was entitled to ſome ſort of notice to quit, and that having been let into poſſeſſion by the leſſor of the plaintiff, he could not without any notice or demand be treated as a treſpaſſer.—But

Lord ELLENBOROUGH held that the agreement operated in the ſame manner as a clauſe of re-entry on a breach of covenant in a leaſe, and that the defendant's intereſt in the premiſes terminated on the 24th of June. His Lordſhip likewiſe thought that the circumſtance of

intereſt

1811.

Doe d. Lerson v. Sayer.

intereſt being afterwards received upon the inſtalments remaining due, was no recognition of the tenancy;—and

The leſſor of the plaintiff had a verdict.

Garrow and *Reader* for the leſſor of the plaintiff.

Jervis and *Spankie* for the Defendant.

[Attornies, *Fiddes* and *Wells*.]

But where the purchaſer is put into poſſeſſion of the premiſes generally under the agreement to ſell, he cannot be ouſted by ejectment before notice to quit or demand of poſſeſſion. Right *d.* Lewis *v.* Beard, 13 Eaſt, 210.

SPENCER *v.* SMITH.

Friday, May 31

ACTION by the payee againſt the acceptor of a bill of exchange for 6*l.*

A bill of exchange accepted by an officer in the recruiting ſervice, in payment of ſmall quantities of ſpirits under the value of 20s. ſupplied by a publican to be uſed out of his houſe by recruits and others under the command of the acceptor, is valid, notwithſtanding 24 G. 2. c. 40. ſ. 12.

Defence, that the bill was accepted in payment of various ſmall quantities of ſpirits, each beneath the value of 20*s.* ſold by the plaintiff, a publican, to be uſed out of his houſe contrary to 24 Geo. 2. c. 40. ſ. 12.

The defendant was a lieutenant in the 3d York Rangers, and employed in the recruiting ſervice. The ſpirits, which were the conſideration for the bill, had been ſupplied by the defendant to be uſed out of his houſe by recruits and others under the defendant's command.—But,

1811.

SPENCER v. SMITH.

Lord ELLENBOROUGH was of opinion, that the act did not extend to invalidate a ſecurity ſo given, and

The plaintiff had a verdict.

Gaſelee for the plaintiff.

Nolan for the defendant.

[Attornies, *Rogers* and *Davis*.]

Vide Jackſon v. Attrill, Peak. Caſ. 180. Gilpin v. Rendle, Selw. N. P. 2d ed. 71.

Saturday, June 1.

EVANS v. WINIFRED BIRCH.

Where a ſervant is in the habit of receiving ſums of money for the uſe of his maſter, and by the eſtabliſhed courſe of dealing, the ſervant pays theſe over to the maſter from time to time, without any written vouchers paſſing between them, the preſumption of law is, that all ſums ſo received by the ſervant are regularly paid over to the maſter: therefore, where there has been ſuch a courſe of dealing, in an action by the maſter againſt the ſervant for money had and received, it is not enough for the maſter to prove that ſums have been received by the ſervant to his uſe; but the *onus* lies upon him to prove by poſitive evidence, that the ſervant has not duly accounted with him.

MONEY had and received. — Plea, the general iſſue.

The plaintiff is a cow-keeper, and had employed the defendant to carry out and ſell milk to his cuſtomers. The mode in which the buſineſs was carried on appeared to be, that the defendant was intruſted with about 20 quarts of milk every morning, for the purpoſe of ſerving a milk-walk to which ſhe was appointed: ſometimes ſhe ſold on credit, and ſometimes for ready money: when ſhe returned to the dairy, ſhe was in the habit of accounting with the plaintiff, and paying

him

him over the money ſhe had received, without any written vouchers paſſing between them.

1811.

EVANS v. BIRCH.

The plaintiff ſought to recover the value of the daily quantity of milk delivered to the defendant for the ſpace of two months before ſhe left his ſervice, during which time it was ſtated ſhe had never accounted with him, or paid him any part of the proceeds of the milk.

Marryat, as his counſel, cited *Longchamp* v. *Kenny*, *Doug.* 137, where the defendant being intruſted with a lottery-ticket to ſell, and refuſing to account for it, Lord *Mansfield* and the court of K. B. held that a preſumption aroſe that he had ſold it, and that he might be compelled to pay the value of it in an action for money had and received. — Two or three of the cuſtomers were likewiſe called, to whom the defendant had ſold milk during the two months, and who had paid her ready money for it. The *onus*, it was contended therefore, lay upon her to rebut the preſumption that ſhe had ſold the milk, and to prove that ſhe had paid over the proceeds to the plaintiff.

Lord ELLENBOROUGH.—I will preſume that the milk was ſold: but I muſt further preſume that the proceeds were regularly paid over to the plaintiff according to the eſtabliſhed courſe of carrying on the buſineſs between the parties. How would it be poſſible for the defendant to diſcharge herſelf, ſuppoſing ſhe had daily accounted for all the ſums ſhe received? No written memorandum of their dealings was preſerved, and ſhe appears frequently to have accounted with him when there was no third perſon preſent. Where ſuch

1811.

EVANS v. BIRCH.

such is the course of dealing, the *onus* lies upon the party who says it has been violated, — or the other might be irretrievably ruined. To support the present action, I think you must give some evidence that the defendant has *not* paid over the money to the plaintiff. If in point of fact she has not, and no negative evidence can be adduced, I am afraid his only remedy will be by a bill in equity for a discovery and account; although this may rather be an expensive mode of settling a milk-score.

It was proved that the defendant had acknowledged she had received 1*s.* 8*d.* which she had not paid over to her master, and for this sum he recovered a verdict.

Marryat for the plaintiff.

Park for the defendant.

[Attornies, *Kinsey* and *Hughes.*]

Vide Wilson v. Hodges, 2 East, 312. Williams v. E. I. Company, 3 East, 192.

1811.

Wednesday, June 5.

HART v. SARAH NEWMAN.

In an action by the payee of a bill of exchange accepted by the defendant for a valuable conſideration, evidence that the plaintiff had been diſcharged as an inſolvent debtor after the bill became due and had given in a blank ſchedule, is not enough to ſhew that the bill had been ſatisfied.

ACTION by the payee againſt the acceptor of a bill of exchange for 27*l.* — Plea the general iſſue.

The defendant having been proved to have accepted the bill for money lent and houſe-rent, her counſel offered evidence that after the bill was accepted and had become due, the plaintiff was diſcharged under the Lords act, and gave in a blank ſchedule; whereby, it was contended, he had acknowledged that the bill was ſatisfied.

Lord ELLENBOROUGH. — This only ſhews (what I fear is too often the caſe) that the ſchedule of the inſolvent was falſe. The mere omiſſion to inſert the bill in his ſchedule is not enough to prove that the amount was not then due; and we have poſitive evidence that it was accepted for a full conſideration.

Verdict for the plaintiff.

Garrow and *Lawes* for the Plaintiff.

Park for the defendant.

[Attornies, *Stevenſon* and *Pierce*.]

Vide Webb v. Fox, 7 T. R. 396.

PRATT

1811.

Thurſday, June 6.

PRATT q. t. *v.* FRASER and Another.

It is an offence againſt 5 Eliz. c. 4. § 31. to employ an unqualified perſon in any ſubſtantive part of a trade within the ſtatute, although he is incapable of doing the more difficult parts of the buſineſs, and never finiſhes any one article.

If a particular trade was carried on in 5 Eliz. it is within the proviſions of the above ſtatute, although the mode of carrying it on has been materially altered.

THIS was an action on 5 Eliz. c. 4. §. 31. for ſetting one *James Stone* on work in the art, myſtery, or manual occupation of a book-binder, he the ſaid *James Stone* not having ſerved therein ſeven years as an apprentice.

It appeared that the defendants had employed *James Stone*, whom they at firſt took into their ſervice as an errand-boy, for ſeveral years paſt in the eaſier parts of binding books both in *boards* and in *leather*; but that he was incapable of doing the more difficult parts of the buſineſs, and had never finiſhed any one book.

The counſel for the defendant took two objections, 1ſt, That *Stone*, from merely doing particular parts of the buſineſs, could not be ſaid to be ſet on work within the meaning of the ſtatute, which was to be conſtrued with great ſtrictneſs; and 2dly, That he had not been proved to do any thing in the buſineſs of a book-binder which was uſually done in the reign of Elizabeth; for books were then univerſally bound, not as now in leather or what we call boards, but in real *bona fide* boards of oak or other timber, to faſhion and attach which to the ſheets of the book was a perfectly different trade from that at preſent carried on by a needle, ſciſſars and paſte.—But

Lord

1811.

PRATT. q. t. *v.* FRASER and Another.

Lord ELLENBOROUGH held, that to employ an unqualified perſon in any ſubſtantive part of the buſineſs was a violation of the ſtatute; and that the buſineſs of a book-binder muſt be conſidered as known in the time of Elizabeth, and comprehended within the ſtatute, although a difference might ſince have been introduced into the mode of carrying it on.—His Lordſhip thought, however, that if Stone had worked at any part of the buſineſs ſeven years before the time mentioned in the declaration, although never bound as an apprentice, the defendants would not have been liable.

The plainiff had a verdict for one penalty.

Garrow and *Lawes* for the plaintiff.

Park and *Dampier* for the defendant.

[Attornies, *Chippendale* and *Fynmore*.]

A perſon merely employed as *out-door man* to nail on horſes-ſhoes made by others, is not ſet on work in the trade of a *farrier* within the meaning of 5 Eliz. c. 4.

However, in *Hudſon* v. *Field*, *Sittings after M. T.* 52 Geo. 3. which was an action on 5 Eliz. for ſetting on work an unqualified perſon in the trade of *a farrier*, the evidence being that this perſon had never aſſiſted in the curing of horſes, nor had made any article of iron manufacture, but had only been employed as *out-door man* in nailing on horſes-ſhoes made by others, Lord ELLENBOROUGH was of opinion that this was not a working in the buſineſs of a farrier, and directed a nonſuit, which the court of K. B. afterwards refuſed to ſet aſide.

UHDE

1811.

Friday, June 7.

UHDE v. WALTERS.

In an action on a policy of insurance on a voyage "to any port in the *Baltic*", evidence admitted to prove that the *Gulph of Finland* is considered in mercantile contracts as within the *Baltic*, although the two seas are treated as separate and distinct by geographers.

POLICY of insurance from London to any port in the *Baltic*.

The ship was taken while proceeding to *Reval* in the *Gulph of Finland*.

The counsel for the plaintiff proposed to call witnesses to prove that the *Gulph of Finland* is considered by nautical and commercial men as within the *Baltic*, although the two seas are treated as separate and distinct by geographers.

This was objected to by the counsel for the defendant, who said the written contract must speak for itself, and it might as well be contended that a policy to the *Mediterranean* would protect the ship in sailing to any port in the *Adriatic* or the *Black Sea*.

Lord ELLENBOROUGH.—I know not what the effect of the evidence offered may be; but I think it is clearly competent to the plaintiff to prove that the *Baltic* is *nomen generale*, comprehending in common understanding the gulphs and inlets which communicate with the sea laid down as the *Baltic* in geographical charts. If the *Gulph of Finland* is to be considered as within the *Baltic*, the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea.

Several

1811.

UHDE v. WATERS.

Several witneſſes were examined who ſtated that all within the *Sound* is conſidered as the *Baltic*; that licences meant to protect ſhips to the *Gulph of Finland* are made out generally to the *Baltic*; and that policies are moſt uſually in the ſame form, although in *Baltic riſks* leave is ſometimes expreſsly given to proceed to ports in the *Gulph of Finland*.

Lord ELLENBOROUGH was of opinion that the evidence was ſufficient to eſtabliſh the point in queſtion, and the plaintiff had a verdict.

The *Attorney General*, *Garrow*, and *Puller* for the plaintiff.

Park, *Topping*, and *Scarlett* for the defendant.

[Attornies, *Crowder* and *Reardon*.]

BAIKIE ESQ. *v.* CHANDLESS, GENT. ONE, &c.

Saturday, June 8.

An attorney employed to purchaſe and prepare the aſſignment of an annuity before the deciſions holding that the truſts in the annuity deeds muſt be particularly ſet forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchaſed was void becauſe the memorial omitted particularly to ſpecify the truſts of the annuity deeds.

THIS was an action againſt the defendant for negligence in the purchaſe of an annuity for the plaintiff.

The declaration ſtated that in conſideration that the plaintiff had retained the defendant to inveſtigate and

1811.

BAIKIE v. CHANDLESS.

ascertain the validity of a certain annuity, the defendant undertook to perform his duty in and about the premises; and although he afterwards caused and procured the plaintiff to accept an assignment of the said annuity, and to pay 216*l.* for the purchase thereof, and it thereupon became and was his duty to take due care in ascertaining that a sufficient memorial of the said annuity had been and was duly inrolled according to the form, effect and exigency of the statute in such case made and provided; yet that he did not do so, and that for want of a sufficient memorial of the said annuity having been inrolled as aforesaid, the said annuity was wholly invalid.

The annuity in question of 35*l.* was granted on the 26th of June 1792, by the Honourable General John Leslie, to one George Wilson during the life of the grantor. General Leslie assigned his pay as an officer in the guards, in trust to secure the payment of the annuity, and to dispose of the surplus for other purposes. There was a memorial of the annuity inrolled in due time, but it did not state particularly the trusts for which the pay was assigned. The present defendant was the trustee, and the grant of the annuity had been negotiated through his agency. In the same year Wilson the grantee wished to sell, and the defendant advised the plaintiff to become the purchaser. In consequence, by deeds which the defendant prepared, the annuity was assigned to the plaintiff for the sum of 216*l.*—For 14 years the annuity was regularly paid; but at the end of that time the grantor refused to pay it any longer; and an action being afterwards

3 brought

brought for the arrears in the court of C. P. the annuity was held to be void for want of a proper memorial.

Garrow, for the plaintiff, referred to *Tolderey v. Allan*, 5 T. R. 480. *Denn d. Dolman v. Dolman*, 5 T. R. 641. and *Aſkew v. Mackreth*, 1 N. R. 214. in which it had been decided that the memorial muſt particularly diſcloſe the truſts upon which property is aſſigned to ſecure payment of the annuity, and contended that the defendant was liable to the plaintiff for not diſcovering the defect in the memorial in queſtion, by which the annuity was invalidated.

The *Attorney General*, contrà, cited a caſe of *Compton v. Chandleſs* tried before Le Blanc, J. ſitting for Lord Kenyon at Weſtminſter in 1802, which was an action againſt the ſame defendant for negligence in reſpect to another annuity which had been ſet aſide for the very ſame defect in the memorial. Mr. Juſtice Le Blanc there obſerved "that it was not every neglect that would ſubject a man to ſuch an action; that an attorney was only bound to uſe reaſonable care and ſkill in managing the buſineſs of his client; that if he were liable further, no man would venture to act in that capacity; that in the year 1787, the date of that annuity, it was not known that theſe truſts ought to be ſtated; that it might appear to a reader of the act at that time, not to have been neceſſary; that courts of juſtice had held otherwiſe ſince, ſeeking to give full effect to the ſpirit of the act; but that the memorial, conſidering the date of it, was drawn with as much

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consideration and skill as could be reasonably expected from a professional man;"—and accordingly there was a verdict for the defendant. Mr. *Attorney* said, he had no hesitation in declaring that if he had been consulted before the decision of the cases referred to, he should without difficulty have given it as his opinion that a memorial in this form was a sufficient compliance with the act of parliament.

Lord ELLENBOROUGH.—An attorney is only liable for *crassa negligentia;* and it is impossible to impute that to the defendant for not discovering a defect in the memorial of an annuity which was subsequently held to be a defect upon a very doubtful construction of the statute. I will adhere to the cases cited, as they have been determined and acted upon; but I am not prepared to say that I should have originally concurred in them. The grant and assignment of this annuity however were prior to all these cases, and at that time the memorial in its actual form might, without any culpable negligence, be considered quite sufficient. I perfectly agree in the observations made on a similar occasion by my brother *Le Blanc*, and I am of opinion that the present action cannot be maintained.

Plaintiff nonsuited.

In an action against an attorney for negligence in respect to the memorial of an annuity which he had prepared and carried in to be inrolled, an examined copy of the roll is prima facie evidence of the original memorial.

In proving the plaintiff's case a copy of the memorial was offered in evidence, which a witness had examined with the *inrolment* at the *Rolls*.

The

The *Attorney General* objected, that the plaintiff ought to produce a copy examined by the original memorial carried in to be inrolled by the defendant, for which alone he was anſwerable.

Lord ELLENBOROUGH. — A copy examined by the *roll* is *primâ facie* ſufficient. The act of parliament requires the memorial carried in to be inrolled correctly, and I muſt preſume that thoſe concerned do their duty under the act. The inrolment is a ſort of ſtatuteable record, and an examined copy of it is admiſſible. The defendant, if he pleaſes, may prove that he carried in another and a perfect memorial which has been miſcopied.

Garrow, *Jervis*, and *Barrow*, for the plaintiff.

The *Attorney General* and *Richardſon* for the defendant.

[Attornies, *Tuckey* and *Chandleſs*.]

In this caſe there was a plea of *actio non accrevit infra ſex annos*.—Q. From what time would the ſtatute of limitations have begun to run? *Vide* Peck v. Ambler, 15 Vin. 119. Jo. 330.

As to the reſponſibility of attornies, *vide* Ruſſell v. Palmer, 2 Wilſ. 325. Pitt v. Yalden, 4 Burr. 2060.

ADJOURNED SITTINGS IN LONDON.

1811.

Tuesday, June 11.

METCALFE *v.* SHAW.

If wearing apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods, and in an action against him for their value, is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter.

ACTION on a promissory note, and for goods sold and delivered. — Plea, the general issue.

The plaintiff, a milliner, supplied articles of dress to the wife of the defendant, who is an apothecary in a small country-town, in the course of six months to the amount of nearly 200*l.* The defendant and his wife were then living together, but there was no evidence whatever that he was at all aware that she had any dealings with the plaintiff. A former account of the same sort that she had with the plaintiff without her husband's knowledge had been paid by her father, who requested that no farther credit should be given to her without her husband's sanction. All the goods in question were subsequently ordered by her alone, and the plaintiff took the promissory note declared upon, for the amount, from her in her own name.

Garrow for the plaintiff contended, that although the defendant might not be liable on the note, nor for the whole of the goods, there must be a verdict against him for such part of them as the jury should think suitable to his circumstances and degree. The notice not to trust his wife, not coming from him, could be

of

of no avail in point of law, and he had not proved that she was furnished with proper apparel from any other quarter.

1811.
MELCALFE
v.
SHAW.

Lord ELLENBOROUGH. — The action clearly cannot be maintained on the promissory note, as the wife had no authority general or special from her husband as his agent to make it; and I think he is not liable for any part of the goods, on this plain ground, that they were not supplied on his credit, and the plaintiff looked to the wife only for payment. The credit was given to the wife, not to the husband.

Plaintiff nonsuited.

Garrow and *Richardson* for the plaintiff.

Topping and *Raine* for the defendant.

[Attornies, *Barber* and *Exley*.]

Vide 1 Campb. 120.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term.

51 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

1811.

Thurſday, July 4.

ROTHEREY *v.* WOOD AND ATKINS, ESQRS.

If upon the goods of a tenant being taken in execution, an agent of the landlord takes from the ſheriff's officers an undertaking for a year's rent, and then conſents to the goods being ſold, the landlord cannot afterwards maintain an action againſt the ſheriff on 8 Ann. c. 11. § 1. for not paying a year's rent on making the levy; although the rent is not paid according to the undertaking, and although the undertaking ſhould be void under the ſtatute of frauds for not ſtating any conſideration.

THIS was an action againſt the Sheriff of Middleſex on ſtat. 8 Ann. c. 14. § 1. (*a*) for not reſerving and paying

(*a*) The ſtatute enacts, that "no goods or chattels whatſoever lying or being in or upon any meſſuage or lands which are or ſhall be leaſed for life or lives, term of years, at will, or otherwiſe, ſhall be liable to be taken by virtue of any execution, on any pretence whatſoever; unleſs the party at whoſe ſuit the ſaid execution is ſued out, ſhall, before the removal of ſuch goods from off the ſaid premiſes, by virtue of ſuch execution or extent, pay to the landlord of the ſaid premiſes or his bailiff, all ſuch ſum or ſums of money as are or ſhall be due for rent for the

paying over to the plaintiff a year's rent on taking in execution the goods and chattels of one *James Clarkſon* the plaintiff's tenant.

1811.
ROTHERAY
v.
WOOD
and Another.

It appeared that when the levy was made there was a year's rent amounting to 52*l.* in arrear, of which the Sheriff had regular notice from the plaintiff's agent; but that this ſame agent accepted from the Sheriff's bailiff and auctioneer a written undertaking in the following form:

"We undertake to pay Mr. Rotherey one twelve-
"month's rent for the premiſes occupied by Mr. Clark-
"ſon, if ſo much rent appears to be due.

"Feb. 5th, 1810. "JOHN WILSON.
"THOMAS BARNETT."

The ſale of the goods then went on with the conſent of the plaintiff's agent; but the arrears of rent have never yet been paid to the plaintiff.

Park for the plaintiff contended, that it was peremptory upon the Sheriff to pay over the arrears of rent to the landlord; that the acceptance of the written undertaking could at moſt amount to a conditional waiver of the landlord's right; and that as the money had not been paid, he might maintain his action for the

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the ſaid premiſes at the time of the taking ſuch goods or chattels by virtue of ſuch execution, provided the ſaid arrears of rent do not amount to more than one year's rent."

1811.

ROTHERAY v. WOOD and Another.

tort which the Sheriff had committed in taking the goods in execution without paying the rent.

Lord ELLENBOROUGH.—I am of opinion that you have completely waived the benefit of the ſtatute. The Sheriff committed no tort in taking the goods in execution without firſt paying the rent, as he did ſo with your conſent. You muſt now proceed upon the undertaking; and whether or not the conſideration is ſufficiently expreſſed on the face of it, ſo as to render it available, is immaterial; for be it valid or invalid as a contract, it is a clear juſtification to the Sheriff. In future, it will be better for landlords to have their rent before they ſuffer their tenant's goods to be ſold in execution; but if they will give truſt, they cannot afterwards reſort to an action on this ſtatute againſt the Sheriff.

Plaintiff nonſuited.

Park and *Littledale* for the plaintiff.

Garrow and *Comyn* for the defendant.

See the caſes upon this ſubject all collected, Tidd. Prac. 915, 6. 4th ed.

CLAYTON

1811.
Thurſday, July 4.

CLAYTON ESQ. *v.* HUNT.

If a carrier receive goods at a diſtance from his office,—to be diſcharged from his common law liability, he muſt prove that the ſpecial terms on which he deals were communicated to the owner of the goods through ſome other medium than a notice ſtuck up in the office; and *that* to be of any avail muſt be in ſuch large characters that a perſon delivering goods at the office cannot fail to read it without groſs negligence.

THIS was an action againſt a carrier for the loſs of a box filled with wearing apparel of the value of 21*l.* intruſted to him to be carried from Oxford to London.

The plaintiff was a ſtudent of Univerſity College, and the box in queſtion was delivered into a cart of the defendant's ſent round to different parts of Oxford to receive goods for the waggon.

The anſwer to the action was, that the defendant had given notice that he would not be liable for any package above the value of 5*l.* unleſs an inſurance was paid upon it. A printed bill containing a notice to this effect was ſtuck up at the office in Oxford, where the buſineſs of the waggon is tranſacted: cards of a ſimilar purport had been circulated about the town: an advertiſement to the ſame effect had been publiſhed in the Oxford newſpapers: but there was no notice on the cart which went round to receive the goods, and there was no evidence that any of the cards had ever been ſeen by the plaintiff, or that he read any newſpaper containing the advertiſement.

The

1811.

CLAYTON v. HUNT.

Lord ELLENBOROUGH held that the defendant in this case had not discharged himself from his common law liability, and

The plaintiff had a verdict for 21*l.*

In the ensuing term the Court refused a rule to shew cause why there should not be a new trial in this case, saying that the notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence, and that if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium.

Park and *Littledale* for the plaintiff.

Garrow and *Comyn* for the defendant.

Vide Cobden v. Bolton, 2 Campb. 108. Butler v. Heane, 2 Campb. 415.

COR.

COR. BAYLEY J.

BOUGHTON *v.* FRERE.

1811.
Saturday, July 6.

THE plaintiff declared in the name of *Edward* Boughton upon a bill of exchange drawn by him, payable to his own order, and accepted by the defendant. The common money counts followed.—Plea, the general iſſue.

If the plaintiff declares by a wrong chriſtian name, this is no ground of nonſuit at the trial, if it can be ſhewn that the defendant knew that the action was brought by the perſon who actually ſues.

It appeared that the plaintiff's real name was *Edmund*, and that in that name he had drawn the bill of exchange.

The defendant's counſel inſiſted that this was a ground of nonſuit, as the bill was miſdeſcribed in the firſt count, and that with reſpect to the money counts, the bill was evidence of money had and received by the defendant to the uſe of *Edmund* not *Edward* Boughton, or of an account ſtated with *Edmund* not *Edward* Boughton.

On the other ſide it was maintained that the defendant ought to have pleaded the miſnomer in abatement, if he meant to take advantage of it, and that the only inquiry now was, whether there had been any contract ſuch as thoſe deſcribed in the declaration between the actual parties to the ſuit, without conſidering by what names they were deſignated in the pleadings.

BAYLEY

1811.

BOUGHTON. v. FREER.

BAYLEY J. thought it would be enough to ſhew that the bill was drawn by the plaintiff, and that the defendant knew by whom the action was brought.

Theſe circumſtances were accordingly proved, and the plaintiff had a verdict.

Garrow and *Abbott* for the plaintiff.

Park for the defendant.

[Attornies, *Meakings* and *Jeys.*]

Vide Mayor and Burgeſſes of Stafford *v.* Bolton, 1 Boſ. and Pulb. 40.

Tueſday, July 9.

COLLINSON AND ANOTHER, ASSIGNEES OF NEWMAN, A BANKRUPT, *v.* HILLEAR.

To render the proceedings under a commiſſion of bankrupt evidence purſuant to Sir Samuel Romilly's act, it is enough to ſhew that they are produced from the cuſtody of the ſolicitor to the commiſſion, or to prove the hand-writing of one of the commiſſioners before whom they were taken.

IN this caſe no notice had been given under Sir Samuel Romilly's act, that the trading, act of bankruptcy, or petitioning creditor's debt was diſputed.

The plaintiff's counſel therefore put in the proceedings under the commiſſion.

Park for the defendant inſiſted that before the depoſitions could be read, they muſt be proved to have been ſubſcribed by the perſons making them, by ſome perſon

perſon who was preſent when they were taken before the commiſſioners.

Lord ELLENBOROUGH. — I ſhall hold it ſufficient to ſhew that the proceedings come out of the proper cuſtody, viz. that of the ſolicitor to the commiſſion.

In this caſe, however, the ſolicitor had been changed, and it could not be proved that the proceedings put in had been handed over by him to the perſon now producing them.

Lord ELLENBOROUGH. — Some further evidence muſt be given that theſe depoſitions were taken under the commiſſion; but I ſhall conſider it enough to prove the ſignature of one of the commiſſioners.

This was done accordingly, and the cauſe proceeded.

Garrow and *Marryat* for the plaintiffs.

Park for the defendant.

[Attornies, *Vines* and *Tilbury*.]

1811.
Tuesday, July 9.

HALLIDAY *v.* WARD THE ELDER.

In an action against A. on the joint and several promissory note of himself and B. to take the case out of the statute of limitations, it is enough to give in evidence a letter written by A. to B. within the six years, desiring him to settle the money.

ACTION on a joint and several promissory note drawn in the year 1805 by the defendant and his son.—Plea, *actio non accrevit infra sex annos.*

To take the case out of the statute, the plaintiff gave in evidence a letter written by the defendant, who is a quaker residing in London, to his son in the country, within the six years, containing the following expressions in allusion to the note:

"With regard to *Halliday*'s money, thou must "settle it thyself. The money here will be all em- "ployed in the business, if carried on with spirit."

Park for the defendant contended that this was insufficient, as it did not amount to a promise to pay, and was not even addressed to the plaintiff, but merely called upon another person to settle the money.

Lord ELLENBOROUGH.—This letter acknowledges the existence of the debt within the six years, and the promise to pay is implied by the law.

The plaintiff had a verdict.

Garrow

Garrow and *Hullock* for the plaintiff.

Park for the defendant.

[Attornies, *Williams* and *Fiſher*.]

1811.

HALLIDAY v. WARD.

See all the caſes upon this point collected Selw. N. P. 151 152, 3. 2d ed.

PITT *v.* SMITH.

Wedneſday, July 10.

An agreement ſigned by a perſon in a ſtate of complete intoxication is void.

THE declaration ſtated, that a certain agreement was entered into between the plaintiff as an agent, and the defendant, for the ſale of an eſtate; and that the defendant afterwards publiſhed a libel concerning the plaintiff, alleging that he had induced the defendant to execute this agreement when in a ſtate of intoxication.

Plea, the *general iſſue*.

The atteſting witneſs to the agreement being called, he was aſked in croſs-examination, whether the defendant was not actually in a ſtate of complete intoxication when he executed the agreement.

The plaintiff's counſel inſiſted that this queſtion was irregular, there being no juſtification on the record.

1811.

PITT v. SMITH.

Lord ELLENBOROUGH.—You have alleged that there was *an agreement* between the parties; and this allegation you muſt prove, as it is put in iſſue by the plea of *not guilty:* but there was no agreement between the parties, if the defendant was intoxicated in the manner ſuppoſed when he ſigned this paper. He had not an agreeing mind.—Intoxication is good evidence upon a plea of *non eſt factum* to a deed, of *non conceſſit* to a grant, and of *non aſſumpſit* to a promiſe (*a*).

It appeared that the defendant had become quite drunk in the company of the plaintiff before ſigning the agreement. Whereupon Lord ELLENBOROUGH directed a nonſuit, which the court of K. B. in the enſuing term refuſed to ſet aſide.

Brougham and *E. Lawes* for the plaintiff.

Garrow for the defendant.

[Attornies, *Vincent* and *Hanſon.*]

(*a*) Cole v. Robins, Bul. N. P. 172.

But it ſeems to have been held in one caſe, that the mere circumſtance of having been in drink, is not ſufficient to avoid a deed or agreement executed under theſe circumſtances; and that for this purpoſe, it is neceſſary to prove that through the management or contrivance of him who gained the deed or agreement, the party was drawn in to drink. Johnſon v. Medlicott, 3 P. Wms. 130.

In writers on the law of Scotland, the doctrine is laid down without any qualification; and drunkenneſs, however produced, is conſidered as avoiding contracts on the ſame ground as inſanity.

"Perſons while in a ſtate of "abſolute drunkenneſs and con- "ſequently deprived of the ex- "erciſe of reaſon, cannot oblige "themſelves:

" themſelves: but a leſſer de-
" gree of drunkenneſs which
" only darkens reaſon, has not
" the effect of annulling the
" contract." *Stair*, July 29th.
" 1672. *Lord Hatton.*

" An obligation granted by
" a perſon while he is in a ſtate
" of abſolute and total drunk-
" enneſs is ineffectual, becauſe
" the granter is incapable of
" conſent, for the law has
" thought it equitable to pro-
" tect thoſe who have not the
" uſe of their reaſon (*even
" though they ſhould have loſt
" it by their own folly*) from
" the fraud or circumvention of
" others." Erſk. Inſt. 814, 5.

AARON *v.* ALEXANDER, CROWLEY and SOLOMONS. Wedneſday, July 10.

TRESPASS and falſe impriſonment. Pleas *not guilty*, and a juſtification under a warrant granted by Mr. JUSTICE BAYLEY upon an indictment found at the Middleſex Seſſions for an aſſault.

The keeper of a priſon who receives and detains one apprehended and charged in his cuſtody under a warrant, runs the riſk of the warrant having been executed againſt the proper perſon; and though acting *bonâ fide*, and without the means of aſcertaining the identity of the individual named in the warrant, he is liable to an action of treſpaſs and falſe impriſonment, if by the miſtake of the officer to whom it was directed, it was executed againſt another.

It appeared that the plaintiff was not the perſon againſt whom the indictment was found; and that being apprehended through miſtake by *Alexander* and *Crowley*, they brought him to a watch-houſe kept by the defendant *Solomons*, who was acting as a conſtable, —where he was detained the whole night. The next morning *Alexander* and *Crowley* carried him before Mr. JUSTICE GROSE; but there being a diſpute as to

In treſpaſs and falſe impriſonment againſt ſeveral, where one acquitted, certificate granted under 8 & 9 W. 3. c. 11. to deprive him of his coſts.

1811.

AARON v. ALEXANDER, and Others.

his identity, the learned Judge refuſed to interfere, and he was ſome time afterwards ſet at liberty.

It was firſt contended that *Solomons* the conſtable and watch-houſe-keeper could not be liable in this action, as he was bound to receive the plaintiff when charged in his cuſtody under the Judge's warrant.

Lord ELLENBOROUGH.—I think *Solomons* was in point of law a treſpaſſer, although he had no means of knowing the perſon of the individual named in the warrant.

However, as *Solomons* had not been concerned in thoſe acts of which the plaintiff principally complained, Lord ELLENBOROUGH ſaid, that the attention of the jury muſt either be confined to the impriſonment in the watch-houſe, or there muſt be a verdict in favour of *Solomons*.

The latter alternative being preferred, there was a verdict only againſt *Alexander* and *Crowley*.

The plaintiff's counſel then applied for a certificate under 8 & 9 W. 3. c. 11. that there was a reaſonable cauſe for making *Solomons* a defendant, for the purpoſe of depriving him of his coſts. It was contended on the other ſide, that this could not be done under the circumſtances of the caſe.

Lord ELLENBOROUGH, after referring to the ſtatute, granted the certificate.

Park

Park and *Marryat* for the plaintiff.

Garrow and *Andrews* for the defendants.

[Attornies, *Harris* and *Allen*.]

1811.

AARON v. ALEXANDER, and Others.

CLARK *v.* MUMFORD.

Wednesday July 10.

INDEBITATUS assumpsit for work, labour, and materials.

Under a general count in indebitatus assumpsit for *work, labour and materials*, the plaintiff may recover for attendances as a farrier and for medicines administered in the cure of the defendant's horses.

The action was brought on a farrier's bill, for attendances on two horses of the plaintiff and medicines administered to them.

Garrow contended that the plaintiff could not recover upon such a count, which conveyed no information of the nature of his demand; and that at any rate the medicines must be considered as *goods sold* to the defendant, and ought to have been declared for accordingly.

Lord ELLENBOROUGH. — Any species of work and labour may be given in evidence under such a general count; and the medicines here may be considered *materials* employed by the plaintiff in and about the business of the defendant.

The plaintiff had a verdict for his whole demand.

1811.

CLARK v. MUMFORD.

Park and *Marryat* for the plaintiff.

Garrow and *E. Lawes* for the defendant.

[Attornies, *Gimingham* and *Greenhill.*]

I have thought that this deciſion may be of ſome uſe to the profeſſion, although the point was not before thought doubtful among gentlemen at the bar. But in caſes of this ſort it is not unuſual to find at leaſt *ten* counts in the declaration—*two* for work and labour as a farrier, &c.—*two* for work and labour generally—*two* for goods ſold and delivered—and the *four money counts*, not omitting *money lent*, which can never be of any uſe except where there is the ſpecific contract of the lending and borrowing of money.—If a declaration contains *general* and *ſpecial* counts for work and labour, the court on motion will order one ſet to be ſtruck out as ſuperfluous. Meeke v. Oxlade, 1 New Rep. 289.

Thurſday, July 11.

Where under an agreement between A. and B. for the ſale of a leaſe, B. accepts a bill for the purchaſe money, and is let into poſſeſſion of the premiſes, it is no defence to an action by A. againſt B. upon the bill, that A. refuſed to execute an aſſignment of the leaſe according to the agreement.

MOGGRIDGE *v.* JONES.

THIS was an action by the payee againſt the acceptor of a bill of exchange for 200*l.* dated 20th July 1810, payable 8 months after date.

On the above day the parties entered into an agreement for the ſale of the leaſe of a houſe, for which the defendant was to pay the plaintiff the ſum of 500*l.* by 3 bills of exchange at eight, eleven, and fourteen months.—The bill in queſtion, together with two

others, making up the 500*l.* were accordingly accepted by the defendant, and he was let into poſſeſſion of the premiſes; but the plaintiff refuſed to grant the leaſe in purſuance of the agreement.

Garrow for the defendant, contended that the conſideration for the acceptance of the bill had failed, and that the action therefore could not be maintained.

Lord ELLENBOROUGH.—There was originally an ample conſideration for this bill of exchange, and it has not completely failed, as the defendant has continued in poſſeſſion of the premiſes. He cannot ſay under theſe circumſtances, that the agreement is entirely reſcinded. He muſt pay the bills and bring his croſs-action on the agreement, or go into equity for a ſpecific performance.

The plaintiff had a verdict, which in the following term *Garrow* moved to ſet aſide; but the Court of K. B. refuſed a rule to ſhew cauſe.

Park and ——— for the plaintiff.

Garrow and *Wylde* for the defendant.

[Attornies, *Rogers* and *Wilde*.]

Vide Morgan *v.* Richardſon, 1 Campb. 40. *n.* Tye *v.* Gwynne, 2 Campb. 346.

1811.

Thurſday, July 11.

ISRAEL v. BENJAMIN.

In an action on a bill of exchange, after payment of money into court, the defendant cannot object to the ſufficiency of the ſtamp on which the bill is drawn.

Q. Whether a 2s. ſtamp be ſufficient for a bill for "50*l.* *with all legal intereſt.*"

THIS was an action againſt the defendant as acceptor of a bill of exchange drawn by the plaintiff in the following words:

"Two months after date pay to me or my order 50*l.* ſterling with all legal intereſt for the ſame."

The bill had a 2*s.* ſtamp applicable to bills above 30*l.* and not exceeding 50*l.*

The defendant had paid 20*l.* into court upon the whole declaration.

Garrow for the defendant, contended that the ſtamp was inſufficient, as the bill was to carry intereſt from the date of it, and therefore a larger ſum was payable upon it than 50*l.*

Lord ELLENBOROUGH. — The defendant is precluded from taking this objection by the payment of money into court, which admits the validity of the inſtrument. — His Lordſhip was likewiſe inclined to think the ſtamp ſufficient, as there was no intereſt due when the bill was drawn, as it was then a ſecurity for the ſum of 50*l.* and no more, and as there is always intereſt to be recovered if the bill is not paid the day it becomes due.

Verdict for the plaintiff.

Garrow

1811.

ISRAEL v. BENJAMIN.

Garrow moved in the enſuing term for a new trial in this cauſe, on the ſame ground he had taken at niſi prius. — The Court gave no opinion as to the ſufficiency of the ſtamp; but clearly thought that the objection could not be taken after the payment of money into court.

The plaintiff's counſel at the trial to prove the payment of money into court, firſt propoſed to examine the attorney who had taken it out of court.

Payment of money into court can only be proved by the rule for paying it in.

Lord ELLENBOROUGH. — You muſt produce the rule for paying the money into court. This is the only regular way in which I can know on what counts it was paid in, or give any effect to it.

Topping and *Marryat* for the plaintiff.

Garrow and *Nolan* for the defendant.

[Attornies, *Williamſon* and *Aſpinall.*]

1811. Thurſday, July 11.

ATKINSON *v.* DICKINSON.

A Judge ſitting at niſi prius at Weſtminſter cannot upon motion make an order in a cauſe entered for trial in London.

COPLEY prayed for leave to make a motion in this cauſe, which he ſaid was entered for trial at the adjourned ſittings in *London*.

Lord

Lord ELLENBOROUGH.—Sitting here at *nisi prius*, I have no juriſdiction reſpecting a cauſe to be tried in London. The motion ſhould have been made to the court in term time, or muſt be poſtponed till I am ſitting at niſi prius in *London*. In the mean time, I may be applied to at chambers to make an order upon a ſummons: but I am now ſitting under a commiſſion of niſi prius for the county of Middleſex; and I cannot upon motion make an order of niſi prius in a cauſe entered for trial in the city of *London*.

Antiently all cauſes in Middleſex were tried at bar. But this, from the encreaſe of buſineſs having been found extremely inconvenient, it was enacted by 18 Eliz. c. 12., that the the Chief Juſtice of England, the Chief Juſtice of the Common Pleas, and the Chief Baron of the Exchequer, or in their abſence two puiſne judges of their reſpective courts, within term time, or four days next after the end of every term, might try in Weſtminſter Hall all manner of iſſues which ought to be tried in any of the ſaid courts by an inqueſt of the ſaid county of Middleſex; and that commiſſions and writs of niſi prius ſhould be awarded in ſuch caſes as had been uſed in any other ſhire of the realm.—*Two* puiſne judges were required to ſit at niſi prius in Middleſex, in the abſence of the Chief Juſtices or Chief Baron till 12 Geo. 1. c. 31., by which it was provided that any *one* judge of the ſeveral courts of record in Weſtminſter Hall, might try cauſes in the manner preſcribed by 18 Eliz. c. 12.; and the time was extended to the ſpace of *eight* days after the end of every term. By a ſubſequent ſtatute, 24 Geo. 2. c. 18. ſ. 5., this time is ſtill further extended to *fourteen* days.—In London trials at niſi prius take place by immemorial cuſtom, and the judges ſit at Guildhall when and as long as the exigency of buſineſs requires.

AD.

ADJOURNED SITTINGS IN LONDON.

1811.
Friday, July 19.

DIPLOCK and Others, Executors, &c. of HENDERSON *v.* BLACKBURN.

If the maſter of a ſhip in a foreign port, from the ſtate of the exchange receives a premium for a bill drawn upon England on account of the ſhip, this belongs to his owner, although there may have been a uſage for maſters of ſhips to appropriate ſuch premiums to their own uſe.

THIS was an action of indebitatus aſſumpſit to recover the balance of an account.

The only queſtion between the parties was, whether the defendant had a right to take credit for a ſum of 134*l.* under the following circumſtances:

The teſtator who commanded a ſhip of which the defendant was owner, when at the Cape of Good Hope had occaſion to draw a bill upon England on account of the ſhip for about 1500*l.* From the ſtate of the exchange at that time, he received as a premium for this bill the ſum of money in diſpute.

Park for the plaintiffs, contended that the 134*l.* belonged to the teſtator, and offered to call witneſſes to prove that it is uſual for the captain of a ſhip under theſe circumſtances to be allowed for his own benefit any advantage ariſing from the ſtate of the exchange.

Lord ELLENBOROUGH.—I am clearly of opinion that this premium belonged to the owner and not to the

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DIPLOCK and others v. BLACKBURN.

the captain. If a contrary uſage has prevailed, it has been a uſage of fraud and plunder. What pretence can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an intereſt againſt his duty. I believe that in this very way, ſervants of the public abroad have been guilty of enormous peculation. The teſtator was undoubtedly bound to debit himſelf for the 134*l.* as much as for any other ſum of money he received on the defendant's account.

Plaintiffs nonſuited.

Park and *Gaſelee* for the plaintiffs.

Garrow and *Campbell* for the defendant.

[Attornies, *Bageley* and *Nind.*]

See the caſes upon this ſubject collected in a late valuable publication, *Paley's Law of Principal and Agent.* p. 41.

JOHNSON *v.* MACHIELSNE.

If foreign ſailors ſtipulate in their own country before the commencement of a voyage, that they will not ſue the captain for any money abroad, but be ſatisfied with what he may advance them in deduction of their wages till they return home, they cannot maintain an action againſt him for wages, in the courts of this country.

ACTION for ſeamen's wages alleged to have been earned on board a Papenburgh ſhip called the

Waak-

Waakfaamkeid, of which the defendant was maſter, in a voyage from *Gottenburgh* to *London*.

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JOHNSON v. MACHIELSEN.

The ſhip was ſeized by an Engliſh cruizer, and libelled in the Court of Admiralty; but afterwards reſtored.

The defence was reſted on the third article of the agreement, ſigned by the plaintiff and the other mariners belonging to this ſhip before the commencement of the voyage:

III. "That they would not in foreign parts proſecute payment of any money whatever of the captain, but be ſatisfied with what he might be pleaſed to advance them abroad in deduction of their wages."

Topping for the plaintiff, contended that this was no bar to the preſent action. The parties by their private agreement could not ouſt the juriſdiction of our courts. The plaintiff might be liable in his own country for ſuing here; but the only thing to be conſidered in this cauſe was, whether the wages were due. The agreement, beſides, was made abroad, and could not be enforced in this country.

Lord ELLENBOROUGH.—If this were merely the regulation of a foreign government, I ſhould leave that government to enforce it by puniſhing the infraction of it, or by any other means that might be more effectual. But by the perſonal contract between the individuals before the court, it is expreſsly ſtipulated

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JOHNSON v. MASHIEL-

lated that the mariners ſhall not ſue the captain for wages in foreign parts. It is impoſſible for me to ſay that this ſtipulation is void. There may be great reaſon for protecting the captain from ſuits in foreign countries, where he may have no funds to anſwer the demands of the mariners; and it may be conducive to the intereſts of commerce that the mariners ſhould have the ſtrongeſt inducement to remain in the ſhip till the adventure is completed. The rate of wages might be in part determined by the condition that they were not demandable till the ſhip's return home. The agreement was made abroad; but it is tranſitory; and we are bound as far as we are able to give it the ſame conſtruction and effect which it would receive in the country where it was made.

The cauſe was afterwards referred.

Topping and *Eſpinaſſe* for the plaintiff.

Garrow and *Copley* for the defendant.

[Attornies, *Rippingham* and *Willett.*]

Vide Gienar v. Meyer, 2 H. Bl. 603. Hulle v. Heitman, Abb. Shipp. P. IV. C. II. § 7.

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Monday, July 22.

DELVALLE *v.* PLOMER, Knt., and Another.

THIS was an action againſt the Sheriff of Middleſex for a falſe return of *nulla bona* to a writ of *fieri facias* ſued out upon a judgment againſt one *Martha Lyalle.*

It was proved that between the teſte and return of the writ, Mrs. *Lyalle* had houſehold furniture and other property in her poſſeſſion, within the defendants' bailiwick, more than ſufficient to ſatisfy the debt.

The defence was, that ſhe was *houſekeeper* to the public Miniſter at our Court from the Prince of Heſſe, and that her goods were therefore privileged from being taken in execution, under ſtat. 7 Ann. c. 12. by which it is provided that "all writs and proceſs againſt "the perſon or goods of an ambaſſador, or other "public miniſter of a foreign prince or ſtate, or the "*domeſtic ſervant* of ſuch ambaſſador or public mi- "niſter, ſhall be utterly null and void to all intents "and purpoſes whatſoever."

In ſupport of this, the defendants gave in evidence a certificate from the Secretary of State's office, that the perſon therein named is the public Miniſter at our Court from the Prince of Heſſe,—a written appointment from this perſon conſtituting Mrs. *Lyalle* his houſe-keeper,—and a notice ſtuck up in the Sheriff's office, intimat-

It is not a ſufficient juſtification to the ſheriff for refuſing to execute proceſs, that the individual againſt whoſe perſon or goods it iſſues has the appointment of domeſtic ſervant to a foreign miniſter at our court, and that notice of this has been ſtuck up at the ſheriff's office, unleſs the appointment be *bonâ fide*; and in an action againſt the ſheriff for a falſe return, the plaintiff may ſhew that the appointment was merely colourable.

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DELVALLE v. PLOMER and Another.

intimating that she was one of the Hessian Minister's domestic servants.

The plaintiff's counsel proposed to prove in reply, that this was colourable and fraudulent; and that at the period in question Mrs. *Lyalle* kept a common boarding-house, and was a dealer in coals.

On the part of the defendants, it was denied that this inquiry could be gone into in the present action. The Sheriffs were bound by the appointment of Mrs. *Lyalle* as the ambassador's housekeeper, and the notice stuck up in their office. They might be expected to inquire who the person was that granted the appointment: they had done so at the Secretary of State's office, and found he was recognized by our government as the ambassador of a Sovereign Prince. It was impossible for them to go farther, or to investigate what particular services were rendered by this lady to His Excellency.

Lord ELLENBOROUGH. — I think it is a fact now to be tried whether *Martha Lyalle* really was a servant to this public minister? If she was not, the appointment and notice are mere nullities, and her goods ought to have been taken in execution according to the exigency of the writ. The Sheriffs might have known that she was not the domestic servant of any one, if she was publicly keeping a boarding house on her own account; and at any rate, this is one among many other questions which Sheriffs in the execution of process must determine at their own peril. In cases

of

of real difficulty they may call for an indemnity, and the Court will enlarge the time for their making their return till an indemnity is given (*a*). The proviſion that *traders* ſhall not be protected by the ſtatute, peculiarly ſhews the neceſſity of tracing the real character of the ſuppoſed domeſtic ſervant in an action of this ſort.

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DELVALLE v. PLOMER and Another.

It was ſatisfactorily proved that *Mrs. Lyalle* at the period in queſtion, did keep a boarding houſe on her own account, and was a dealer in coals.

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

Park and *Comyn* for the defendants.

[Attornies, *Pearse* and *Smith*.]

(*a*) In this very caſe the Sheriffs had been indemnified before they returned *nulla bona*.

FORSTER *v.* TAYLOR GENT. ONE, &c.

Monday, July 22.

THIS was an action by the landlord of the *Three Tons* Tavern in the Borough of Southwark, for a dinner

Where a private act of parliament provides for the expence of *maintaining* the jury ſummoned to aſſeſs the value of property taken under the act, this does not extend to a dinner at a tavern given to the jury after delivering in their verdict.

Where a party of ſeveral perſons dine together at a tavern, they are jointly liable for the whole expence, and not merely each for his own ſhare.

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furniſhed by him to the Jury ſummoned to aſſeſs the value of property under a private act of parliament, and eaten by them after they had delivered their verdict.

The plaintiff at firſt reſted his caſe upon the words of the act, by which it is provided that the expence of *maintaining the jury* ſhall be borne in a particular manner which would have made the defendant liable as attorney for one of the parties. The counſel ſtated that it was the conſtant practice upon ſuch occaſions to provide a dinner for the jury after the buſineſs was over; and it was often pointed out in theſe acts of parliament by whom the expence ſhould be borne. —But

Lord ELLENBOROUGH was of opinion that the words could not be extended to a dinner of this ſort, and that the legiſlature could not be underſtood to have ſanctioned a ſyſtem of junketing among jurymen.

It appearing, however, that the defendant's clerks, by his permiſſion, had partaken of the dinner;—

Lord ELLENBOROUGH thought that this made him liable; and that the undertaking being joint, and there being no plea in abatement, he was liable for the whole.

The plaintiff therefore had a verdict for the amount of his bill.

Park

Park and *Nolan* for the plaintiff.

Garrow, and *D. Pollock* for the defendant.

[Attornies, *Alcock* and *Taylor*.]

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In *Rol. Abr.* "*Action ſur caſe*," 24. 15. the ſame doctrine is laid down as to the joint liability of perſons partaking of a tavern dinner, — with this diſtinction, that thoſe who are *invited* are not liable to the landlord, if he knew that fact. It is ſaid, if A. invite B. "*a manger et boier en le meaſon de J. S., quant al hoſte, ambideux ſont liable a paier le reckning, niſi le hoſte conuſt B. d'eſtre invite.*"

But the officers of a regimental meſs are only ſeparately liable, each for his own ſhare.

Brown v. *Doyle and others. Sittings after M. T.* 1788. *Cor. Lord Kenyon.*

This was an action for proviſions furniſhed for the uſe of a meſs of officers in camp, the defendants and others compoſing the meſs. — Plea, *non aſſumpſit.*

A paper containing the account was proved, which was delivered by another of the meſs to plaintiff with the word "paid" upon it, intimating that his proportion was paid.

Lord KENYON thought this ſhewed that the plaintiff meant to charge them ſeverally. He alſo thought that originally they were only ſeverally liable; and the verdict was for the defendants.

GANTT *v.* MACKENZIE.

Tueſday, July 23.

THIS was an action on a bill of exchange for 1000*l.* drawn at *Barbadoes* the 8th of February 1809, by

In an action againſt the drawer of a foreign bill of exchange diſhonored here for non-acceptance, where the plaintiff is allowed a *per centage* in name of damages, he is only entitled to intereſt from the day when the bill ought to have been paid.

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the defendant on *Scott, Idles & Co.* in London, payable to the plaintiff at 60 days ſight.

The bill was refuſed acceptance on the 17th April 1809, and was afterwards preſented for payment on the 19th June following, and again diſhonoured.

The only queſtion was, from what period intereſt was to be calculated.

Lord ELLENBOROUGH left this upon the cuſtom of merchants, to the gentlemen of the ſpecial jury; who ſaid, the holder of the bill was entitled to 10*l.* per cent. as damages, and that intereſt was to be allowed only from the time when the bill was preſented for payment; and Mr. *Waddington*, the foreman, obſerved that he had known it ſo ſettled in a caſe before Mr. JUSTICE BULLER.

Verdict accordingly.

Garrow and *Gaſelee* for the plaintiff.

The *Attorney General* and *Park* for the defendant.

[Attornies, *Gregſon & Co.* and *Humphreys.*]

Where there is no allowance for damages, the plaintiff is entitled to intereſt from the day the bill was diſhonored for non-acceptance.

But in a caſe of *Harriſon* v. *Dickſon* tried the ſame ſittings, which was an action againſt the indorſer of a bill of exchange drawn upon England from *N. S. Wales*, the plaintiff did not claim any per centage upon the principal as damages, and was allowed intereſt from the time the bill was diſhonoured for non-acceptance.

BELLAIRS

1811.

Wednesday, July 24.

BELLAIRS AND ANOTHER *v.* EBSWORTH.

THIS was an action of debt on bond dated 7th Auguſt 1806, executed by the defendant, one Philip Nott, and one John Nott, by which they bound themſelves jointly and ſeverally in the penal ſum of 1500*l.* under the following condition:

If A. become bound to B. under condition that C. ſhall truly account to B. for all ſums of money received by C. for B.'s uſe, and C. afterwards, with B.'s knowledge, takes D. as his partner; the guarantie does not extend to ſums of money received by C. for B.'s uſe, after the formation of the partnerſhip.

"Whereas the above bounden Philip Nott hath for ſome time paſt acted as the agent for the ſaid A. and J. Bellairs, in the receiving of various large ſums of money for them, and the ſaid Philip Nott will continue to receive money and other things on their account. And whereas the better to ſecure the ſaid A. and J. Bellairs the payment of all ſuch ſum and ſums of money, which at any time hereafter ſhall be in the hands of the ſaid Philip Nott belonging to the ſaid A. and J. Bellairs, the ſaid Philip Nott hath propoſed and agreed to execute this preſent bond of indemnity, and hath prevailed on the ſaid John Nott and John Ebſworth to become ſurety for and to join with him the ſaid Philip Nott in the execution hereof, and to guarantee the ſaid A. and J. Bellairs and the ſurvivor of them againſt any loſs they may happen to ſuſtain on account of their confidence in the ſaid Philip Nott touching the matters aforeſaid: Now the condition of the above written obligation is ſuch, that if the above bounden Philip Nott, his heirs, executors and adminiſtrators do and ſhall from time to time, and at all times,

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as often as he or they ſhall be thereunto required by the ſaid A. and J. Bellairs, or the ſurvivor of them, make, draw out and deliver unto them, or the ſurvivor of them, a true and juſt account of all ſuch ſum and ſums of money, bonds, bills of exchange, promiſſory notes, or other ſecurities for money, which he the ſaid Philip Nott, ſhall or may hereafter receive or be intruſted with for and on account of the ſaid A. and J. Bellairs or the ſurvivor of them; and if the ſaid Philip Nott, his heirs, executors or adminiſtrators ſhall and do, from time to time, and at all times hereafter, when thereunto required, pay or cauſe to be paid unto the ſaid A. and J. Bellairs or the ſurvivor of them, all ſuch ſum and ſums of money which the ſaid Philip Nott ſhall hereafter receive or be intruſted with for, or on account of the ſaid A. and J. Bellairs or the ſurvivor of them, and alſo ſhall when thereunto requeſted, deliver unto the ſaid A. and J. Bellairs or the ſurvivor of them, all ſuch bonds, bills of exchange, promiſſory notes, or other ſecurities for money, which he the ſaid Philip Nott, ſhall or may hereafter receive or be intruſted with for or on their account; and if the ſaid Philip Nott ſhall conduct himſelf truly, juſtly and honeſtly towards the ſaid A. & J. Bellairs, and the ſurvivor of them, in all his dealings and tranſactions with them or the ſurvivor of them touching the matters aforeſaid, then the above written obligation to be void, &c.

The defendant, after craving oyer, pleaded that Philip Nott had accounted &c. according to the condition of the bond.

The

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BELLAIRS and Another v. EBSWORTH.

The replication assigned several breaches, in not paying over money received by Philip Nott for the plaintiffs' use.

It appeared that the Messrs. Bellairs being bankers in the country, had employed Mr. P. Nott as their agent in London, to receive and pay money and securities on their account. He had no partner before or at the time the bond was executed; but he subsequently entered into partnership with two persons of the name of *Mingay*, and carried on business with them under the firm of *Mingay, Nott & Co.* The plaintiffs continued to deal with the new partnership as they had before done with P. Nott alone, till June 1810, when the house failed. A considerable sum of money was then due from them to the plaintiffs; but every thing had been regularly paid, which had been received by P. Nott only before the formation of the partnership.

Garrow for the plaintiff, contended, that the deficiency at the time of P. Nott's failure was a clear breach of the condition of the bond. The money due had been received by him, although he had received it conjointly with two others. Could it be said then that he had "paid or caused to be paid to the plaintiffs all such sum and sums of money which he had received or been entrusted with, for or on account of the plaintiffs, or that he had conducted himself truly, justly and honourably towards the plaintiffs in all his dealings and transactions with them?" The defendant, as surety, took upon himself the risk of P. Nott en-

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BELLAIRS and Another v. EBSWORTH.

tering into partnerſhip with improper perſons, and became liable for his good conduct as the plaintiffs' agent, whether acting ſeparately or in conjunction with others.

Lord ELLENBOROUGH.—The defendant was ſurety for *Philip Nott*, and not for *Mingay, Nott & Co.* When the plaintiffs entruſted their agency to the new firm, the defendant's reſponſibility was at an end. He by no means undertook for the good conduct of any future partner with whom *P. Nott* might aſſociate. The recital and the whole ſcope of the condition ſhew that the ſuretyſhip was confined to *P. Nott* individually.

Plaintiffs nonſuited.

Garrow and *Gurney* for the plaintiffs.

Park and *Marryat* for the defendant.

[Attornies, *Adam* and *Davies.*]

So if there be a bond conditioned for payment to A., B., and C., of all ſums advanced by them their banking houſe to D., on the death of one of the partners, the obligation ceaſes. Strange v. Lee, 3 Eaſt, 484.

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Wednesday, July 24.

HOARE AND OTHERS *v.* GRAHAM AND ANOTHER.

In an action on a promiſſory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it ſhould be renewed, and payment ſhould not be demanded when it became due

THIS was an action on a promiſſory note for 450*l.* dated 19th October 1810, made by *Gibbon & Boyce*, payable to the defendants two months after date, indorſed by them to *Grill & Son*, who indorſed it to the plaintiffs.

The defence ſet up was, that the note had been drawn as a collateral ſecurity for certain advances made by the plaintiffs to *Grill & Son*; that at the framing of the note, the defendants refuſed to indorſe it, unleſs the plaintiffs would agree that it ſhould be renewed when it became due; that the latter acceded to this condition, and that they afterwards demanded payment, inſtead of calling for a renewal.

Lord ELLENBOROUGH. — I don't think I can admit evidence of this ſort. What is to become of bills of exchange and promiſſory notes, if they may be cut down by a ſecret agreement that they ſhall not be put in ſuit? The parol condition is quite inconſiſtent with the written inſtrument. This purports to be a promiſſory note payable two months after date. You ſay it was not payable at the end of that time, and that when the two months had expired the payees, inſtead of the money, were to have another promiſſory note. I will receive evidence that the note was indorſed to the plaintiffs as a truſt; but the condition for a renewal

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newal entirely contradicts the inſtrument which the defendants have ſigned. Such an agreement reſts in confidence and honour only, and is not an obligation of law. There may, after a bill is drawn, be a binding promiſe for a valuable conſideration to renew it when due; but if the promiſe is cotemporaneous with the drawing of the bill, the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition, — which is contrary to firſt principles. There muſt be a

Verdict for the plaintiffs.

The *Attorney General*, *Garrow* and *Marryat* for the plaintiffs.

Park and *Scarlett* for the defendants.

[Attornies, *Dawes* and *Palmer*.]

So in an action on a policy of inſurance, evidence cannot be received of a parol agreement that the riſk ſhould begin at a place different from that inſerted in the policy. Kaines v. Knightly, Skin. 454.

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POYNTON v. FORSTER AND OTHERS.

Semble, that in an action for maliciouſly ſuing out a commiſſion of bankrupt, it is a fatal variance to alledge, that the defendant ſued the commiſſion out of the "*High Court of Chancery*."

CASE for maliciouſly ſuing out a commiſſion of bankrupt.

The

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POYNTON v. FORSTER and others.

The declaration ſtated that the defendants, without any reaſonable or probable cauſe whatſoever, ſued and proſecuted, and cauſed and procured to be ſued and proſecuted *out of His Majeſty's High Court of Chancery* againſt the plaintiff a certain commiſſion under the great ſeal of Great Britain, founded on the ſeveral ſtatutes made and then in force concerning bankrupts, &c.

The Commiſſion being put in,—

Park for the defendant, objected that it was miſdeſcribed in the declaration, as it did not iſſue out of the *High Court of Chancery*. The juriſdiction of the perſon who holds the great ſeal in *bankruptcy* is quite diſtinct from his juriſdiction as *Lord High Chancellor*. The Maſter of the Rolls may repreſent him in the latter capacity, but cannot ſit upon the moſt trifling bankrupt petition. A commiſſion of bankrupt does not iſſue, like original writs, from the great *officina brevium* in the Court of Chancery; but it paſſes under the great ſeal by virtue of certain acts of parliament, and has no more its origin in the Court of Chancery than a patent for a new invention.

The *Attorney General* and *Holroyd*, contrâ, pointed out that the commiſſion was iſſued upon a petition addreſſed to "John Lord Eldon, *Lord High Chancellor of Great Britain*," and was actually ſigned by him "ELDON, C." They contended that commiſſions iſſued by the Lord Chancellor might without impropriety be ſaid to iſſue out of the Court of Chancery; and at any rate, that this deſcription of the commiſſion might be rejected as ſurpluſage, and it was enough to prove

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prove that it iſſued under the great ſeal of Great Britain, which would have been enough to ſtate in the declaration.

Lord ELLENBOROUGH was inclined to think that the declaration contained a fatal miſdeſcription of the commiſſion, but ſaved the point at the requeſt of the plaintiff's counſel (*a*).

In ſuch action, to ſuſtain an allegation, that the commiſſion was duly ſuperſeded, it is not enough to prove an order by the Lord Chancellor directing it to be ſuperſeded.

The declaration further alleged, that the ſaid commiſſion was afterwards, on the application and petition of the plaintiff preferred to the Right Honourable John Lord Eldon, Lord High Chancellor of Great Britain, duly ſuperſeded.

To ſupport this allegation, an order was put in, ſigned by the Lord Chancellor, directing the commiſſion to be ſuperſeded.—But

Lord ELLENBOROUGH was of opinion that this was inſufficient, and that it was neceſſary to produce a writ of ſuperſedeas under the great ſeal (*b*).

Plaintiff nonſuited.

The *Attorney General*, *Garrow* and *Holroyd* for the plaintiff.

Park and *Richardſon* for the defendant.

[Attornies, *Blacklock* and *Watkins*.]

(*a*) *Vide* Chapman v. Pickerſgill, 2 Wils. 145.

(*b*) So in an action for a malicious arreſt, to ſhew the former ſuit determined, it is not enough to put in a Judge's order to ſtay pro-

proceedings on payment of costs, and to prove that the costs were paid accordingly. 1 Esp. N. P. Cas. 80.—And where it was alleged in an action for the malicious prosecution of an indictment, that the plaintiff was *legitimo modo acquietatus*, and it appeared that he was acquitted no otherwise than by an entry of a *nolle prosequi*, the Court held that this evidence did not support the declaration; for the *nolle prosequi* is a discharge as to the indictment, but it is not an acquittal of the crime. Goddard *v.* Smith, Salk. 21. 6 Mod. 261. S. C.

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POYNTON *v.* FORSTER and Others.

BLACKBURN AND ANOTHER *v.* THOMPSON.

Friday, July 26.

THIS was an action on a policy of insurance dated 21st December 1807, on the cargo of the *Elizabeth* and *Mary*, "at and from London, until the ship's "arrival at her last port or place of trade and discharge "in Hayti (formerly called St. Domingo)."

Since the 19th of May 1806, the trading between this country and ports and places in the Island of St. Domingo, not under the dominion and in the actual possession of his Majesty's enemies, has been lawful without any licence,

The vessel, under British colours, sailed from London in November 1807, with a cargo of dry goods, provisions and wine, the property of the plaintiffs, bound for St. Domingo. In the month of January following she arrived at *Cape François*, then under the dominion of *Christophe*. Here the plaintiff's agent sold and delivered about a fifth part of the cargo, and contracted with the Intendant of *Christophe* for the sale of the remainder, deliverable at *St. Marc's*, another port under the dominion of the same chief. The ship was proceeding thither when she was captured by his Majesty's ship *Dædalus* and carried into *Jamaica*. The cargo was proceeded against in the Vice-admiralty Court there, and condemned as lawful prize; but on appeal

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appeal to the Privy Council, this ſentence was reverſed, and the proceeds of the cargo were ordered to be reſtored, on payment of the captor's expences.

No licence was put in on the part of the plaintiff.

Topping and *Carr* for the defendant, contended, that without a licence the voyage was illegal as a trading with the enemy. The Court muſt take notice that *St. Domingo* was a colony belonging to France, with whom we are at war; and whatever internal changes might take place in it, until recognized in a new capacity by ſome ſolemn act of our government, it muſt continue to be conſidered an enemy's colony. Courts of juſtice are incompetent to enquire whether ſuch a change has taken place in a colony belonging to a foreign nation that it may be looked upon as ſeparated from the mother country, and as having acquired an independent exiſtence; and were the ſeparation ever ſo complete, it is only from the King's proclamations and acts of ſtate we can know whether the emancipated colony is to be conſidered hoſtile, neutral or friendly. In the words of Sir William Grant in the caſe of the *Pelican*, *Burke*, before the Privy Council (*a*), "it always "belongs to the government of the country to de- "termine in what relation any other country ſtands "towards it; that is a point on which courts of juſtice "cannot decide."—It is therefore incumbent on the plaintiffs to ſhew, that before the commencement of the

(*a*) 1 Edwards, App. D.

voyage

voyage in queſtion our government had legalized the trade between Great Britain and St. Domingo. But the firſt order in council for this purpoſe bears date 14th July 1808; and previous to that time all veſſels ſailing from Great Britain to St. Domingo traded under a licence, in the ſame manner as if they had been bound for a port of France on the continent of Europe. This very queſtion has already been diſpoſed of by the deciſion of the Court of Appeals in the caſes of the *Dart* and *Happy Couple*, in which it was held that notwithſtanding the unſettled ſtate of St. Domingo, and that the authority of France was no longer regarded there, it was ſtill in point of law under the dominion of France, and muſt be conſidered as an enemy's colony.

17th March, 1808, cited 1 Edwards, 1.

The *Attorney General* for the plaintiff, allowed the general principle that a country which had been an enemy's colony, whatever internal revolution might happen in it, muſt ſtill be conſidered in a court of juſtice as bearing an hoſtile character till recognized by our own government as ſtanding in a different relation. Upon this principle the caſes of the *Dart* and *Happy Couple* proceeded. Theſe ſhips were taken early in the year 1805; and although it was matter of notoriety that a conſiderable part of St. Domingo had been then emancipated from the dominion of France, nothing had been done by our government to authorize a Prize Court to preſume a change in its national character. But between that period and the commencement of the preſent voyage, orders in council were iſſued, which although they do not expreſsly

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legalize the trade between Great Britain and St. Domingo, do moſt diſtinctly recognize that parts of that Iſland were no longer under the dominion of France, and were therefore to be conſidered neutral territory. By the firſt, dated 19th November 1806, His Majeſty authorized the Governor of the *Bahama Iſlands*, and others, to grant licences to Britiſh veſſels to clear out from the port of *Road Harbour* in the Iſland of *Tortola*, and from the free ports in the Bahama Iſlands, "to ſuch ports or places in the Iſland of St. Domingo as are not or ſhall not be under the dominion and in the actual poſſeſſion of any of His Majeſty's enemies." On the recapture of *Buenos Ayres*, another order in council was iſſued, dated 11th February 1807, permitting all Britiſh veſſels which had cleared out from any ports of the United Kingdom to Buenos Ayres and the River Plata "to proceed without interruption to any port of the Iſland of St. Domingo *not in the immediate poſſeſſion and under the controul of France and Spain*, there to diſpoſe of their cargoes." And by a ſimilar order dated 15th July 1807, the Governor of *Nova Scotia* is authorized to grant licences to Britiſh ſhips to clear out from any port in the province of *Nova Scotia* "to ſuch ports and places in the Iſland of St. Domingo as are not or ſhall not be under the dominion and in the actual poſſeſſion of the government of France or Spain." Theſe were authoritative declarations to courts of juſtice that parts of St. Domingo had ceaſed to be under the dominion of the enemy and to bear a hoſtile character, and opened the queſtion in each particular caſe in which the legality of a

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voyage to St. Domingo was disputed, whether the part of the Island to which the ship was bound was or was not under the dominion of the enemy. Such is the effect which has been given to these orders by our Courts of Prize. In the case of the *Manilla*, *Barret*, 1 *Edwards*, 1, Sir William Scott held that in consequence of these orders in council, ports and places of St. Domingo not in possession of the French, were excepted out of the general character of the Island as an enemy's colony, so that the voyage of an American ship from *Port au Prince* to *Gottenburgh* was considered as not being contrary to the order in council of 11th November 1807, forbidding all commerce between the *enemy's colonies* and foreign states. So in the case of the *Pelican*, *Burke*, before alluded to, where the same question arose at the Cockpit, the vessel under Danish colours having been captured on a voyage from *Port au Prince* to *New York*, Sir William Grant in giving judgment says, "We are of opinion that these orders do contain a recognition on the part of His Majesty's government, that there are ports and places in St. Domingo not only not in the possession but also not under the dominion of *France*. The only ground for condemnation in this case is, the trading from a hostile colony; but that cannot apply to those parts of it which are not considered or held to be under the dominion of the enemy; and therefore the real question is as to the description and character of the port or place from which the vessel was trading. It was not necessary that government should have ascertained in what way affirmatively St. Domingo should be politically and commercially considered. It is sufficient for the present question, that the orders

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negative a hoſtile character applying to certain parts of the colony." The property was therefore reſtored. — In this caſe the only objection to the legality of the voyage is, that it is a trading to an enemy's port. But theſe orders declare that there are ports in St. Domingo which are not enemy's ports; and it is not contended that during any part of this adventure either *Cape Francois* or *St. Marc's* was in the poſſeſſion or under the dominion of France. The voyage was therefore innocent in its own nature, and required no licence to legalize it. Had it not been ſo, the ſentence of the Vice Admiralty Court would not have been reverſed by the Privy Council.

Topping in reply, inſiſted that the very orders relied upon were ſtrong to ſhew that voyages of Britiſh ſhips to St. Domingo (except from *Road Harbour* and the other ports ſpecified, under a licence granted by the Governor,) were illegal, till the general order of 14th December 1808; and he denied that the caſes of the *Manilla* or *Pelican* applied, as they turned merely upon the conſtruction of the orders in council with reſpect to neutral navigation.

Lord ELLENBOROUGH. — The queſtion here is, Whether the ſhip in queſtion was engaged in a trading to a hoſtile territory. In the preſent ſituation of the world, the national character of differerent places muſt from time to time be determined by courts of juſtice. We had lately occaſion to try the national character of *Corfu* (*a*.) The moſt potent evidence upon

(*a*) See Donaldſon v. Thompſon. 1 Campb. 429.

ſuch

ſuch a ſubject is the declaration of the ſtate; and if the ſtate recognizes any place as not being in the relation of hoſtility to this country, that is obligatory on courts of juſtice. In the order in council of 15th July 1807, though emitted for a different purpoſe, I find a diſtinct recognition that there are ports and places in the iſland of St. Domingo not in the poſſeſſion or under the dominion of the enemy. Does not this bring it then to a point of fact, whether *Cape Francois* and *St. Marc's* were of that deſcription, — about which there is no controverſy. The court of appeal had all the circumſtances before them; they knew how the voyage had been inſtituted and how it had been proſecuted; and as they ordered the property to be reſtored, I muſt conſider that they recognized the voyage to be legal, and that there was a legal ſubject of inſurance.

Verdict for the plaintiff.

A rule obtained in the enſuing term to ſhew cauſe why this verdict ſhould not be ſet aſide, and a new trial granted, was afterwards diſcharged, — the whole court fully concurring with the opinion delivered by Lord ELLENBOROUGH at niſi prius.

The *Attorney General*, *Garrow*, *Park*, and *Campbell* for the plaintiff.

Topping and *Carr* for the defendant.

[Attornies, *Nind* and *Gibbs*.]

Vide Johnſon v. Greaves, 2 Taunt. 344. *acc.*

OXFORD CIRCUIT.

SUMMER ASSIZES, 51 GEORGE III.

WORCESTER.

CROWN SIDE. CORAM LAWRENCE, J.

1811.
Tuesday, July 30.

REX v. RICKETTS.

It is not an offence within the clause of Lord Ellenborough's act, 43 G. 3. c. 58., against *maliciously cutting, with intent to resist lawful apprehension*, if the cutting took place in an attempt to apprehend the prisoner previous to any notification being made to him of the purpose for which he was laid hold of.

THIS was an indictment on Lord Ellenborough's act, 43 Geo. 3. c. 58. for maliciously cutting one *J. Webb* with intent to obstruct, resist and prevent the lawful apprehension and detainer of the prisoner.

It appeared that in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one *J. Spilsbury*. The wheat being soon after found concealed in an adjoining field, *Spilsbury*, *Webb* and others, watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued, and *Webb* seized the prisoner,

without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before *Webb* had spoken, the prisoner drew a knife and cut him across the throat.

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REX
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Lawrence, J.—As *Webb* did not communicate to the prisoner the purpose for which he seized him, this case does not come within the statute. If death had ensued, it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different complexion. The prisoner must be acquitted upon this indictment.

He was afterwards found guilty of larceny in stealing the wheat.

Gleed and *Peake* for the prosecution.

Pettit for the prisoner.

But if a constable acting within his district, where he is generally known, produces his staff of office, the law will presume that the party to be apprehended had due notice of his intent, without a verbal notification. Gordon's case, 1 East, P.C. 315. And it is sufficient for a constable to say, he arrests *in the King's name*. 1 Hale. 583. Where the party knows the officer and his business, the law requires no express notice to be given. As where *Pew* drew his sword upon a bailiff who came to arrest him, and said, "Stand off, I know "you well enough, come at your "peril;" and upon the bailiff's immediately taking hold of him without using words of arrest or shewing any warrant, *Pew* killed him: this was holden to be murder. Pew's Case. Cro. Car. 183.

GLOUCESTER.

Coram Le Blanc, J.

1811.

Saturday, Aug. 3.

Betterbee v. Davis.

It is not a good tender of a fractional ſum, for the debtor to offer the creditor a bank note to a larger amount, and to deſire him to take out of that the ſum to be paid.

IN aſſumpſit, iſſue was joined upon a tender of the ſum of 3*l.* 10*s.*

It appeared that before the action was commenced the defendant produced to the plaintiff a 5*l.* bank note, and deſired him to take 3*l.* 10*s.* out of that. The plaintiff ſaid "I will ſee you another time," and walked away.

The counſel for the defendant contended, that this was a ſufficient tender; and relied upon *Wade's Caſe*, 5 Co. 115. *a*, where it was reſolved, "That if a man tenders more than he ought to pay, it is good, for *omne majus continet in ſe minus*, and the other ought to accept ſo much of it as is due to him. *Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum eſt. Et in majore ſummâ continetur minor.*"

Le Blanc, J. The caſe in *Lord Coke* refers to *monies numbered*. If I tender a man twenty guineas in the current coin of the realm, this may be a very good tender of fifteen, for he has only to ſelect ſo much

much, and reſtore me the reſidue. But a tender in bank notes is quite different. In that caſe, the tender may be made in ſuch a way that it is phyſically impoſſible for the creditor to take what is due, and return the difference. If 3*l.* 10*s.* could be tendered by a note for 5*l.*, ſo it might by a note for 50,000*l.* The iſſue muſt be found for the plaintiff.

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BETTERBEE v. DAVIS.

Dauncey and *Abbott* for the plaintiff.

Jervis and *Hughes* for the defendant.

Vide Spybey *v.* Hide, 1 Campb. 181.

MONMOUTH.

CORAM LE BLANC, J.

DOE d. MORGAN *v.* CHURCH.

Monday. Aug. 5.

EJECTMENT for a meſſuage and lands.

Where a houſe, lands and tithes are held under a parol demiſe at a joint rent, a notice to quit, "the *houſe, lands and premiſes*

The defendant had held theſe premiſes together with certain *great and ſmall tithes* at a joint rent of

th the appurtenances," includes the tithes, and is ſufficient to put an end to the tenancy. ——*Semble* that although tithes are let by parol, the tenant is entitled to a notice to quit.

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MORGAN v. CHURCH.

145*l.* a year under a parol demiſe from the leſſor of the plaintiff.

The queſtion was, whether the tenancy was determined by the following notice to quit:

Mr. Edward Church,

I do hereby give you notice to quit and deliver up to me or my aſſigns on the 2nd of February next, the quiet and peaceable poſſeſſion of all *that meſſuage, tenement or dwelling houſe, farm, lands, and premiſes* with the appurtenances which you rent of me in the pariſh of S. or elſwhere in the county of M. Dated 30 April 1810.

A. Morgan.

Dauncey and *Peake* for the defendant, contended, that the notice did not extend to the *great and ſmall tithes*, and was therefore a nullity. Where ſeveral things are held under a joint demiſe, the leſſor cannot determine the tenancy as to part only. But this notice contained no words which could poſſibly apply to tithes. The tenancy as to the tithes therefore ſtill continued; and in that caſe, ſo did the tenancy as to the houſe and lands now ſought to be recovered.

Jervis and *Abbott* contrà, gave two anſwers to the objection, 1ſt. That as tithes cannot be demiſed except by deed, and as the demiſe here was by parol, the defendant never had any legal intereſt in the tithes and there was no tenancy as to them to be determined. 2dly, That the word *premiſes* was large enough to com-

comprehend the *tithes*, and was not to be confined to the houſe, farm, and lands before mentioned.

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Le Blanc, J. ſaid, If there be a joint demiſe of land and tithes at a joint rent, it is clear that the landlord cannot determine the tenancy as to the land without at the ſame time determining it as to the tithes. In this caſe, he was inclined to think that although the tenant had only a licence to take the tithes, the notice ought to extend to them. But he was clearly of opinion that the notice was ſufficient for that purpoſe. Where the tithes were held along with the farm, it muſt have been underſtood by both parties that this notice was to apply to both. His Lordſhip therefore directed a

Verdict for the leſſor of the plaintiff.

Although a leaſe of tithes cannot be without deed, yet a parol agreement for retaining tithes muſt be determined by a notice with analogy to the notice given in a holding of land. Wyburd v. Tuck, 1 Bos. and Pul. 465. Biſhop v. Chicheſter, 4 Grom. 1316, 2 Bro. C. C. 161 S. C.

CROWN SIDE. CORAM LAWRENCE, J.

Tueſday, Aug. 6.

THIS was an indictment on the 2nd ſect. of Lord Ellenborough's act, 43 Geo. 3. c. 58, for adminiſtering

Upon an indictment on 43 G. 3. c. 58. § 2. charging the priſoner with having adminiſtered to a woman the *decoction* of ſavin, with intent to procure abortion, it is no a material variance that the preparation of ſavin adminiſtered, is properly called an *infuſion*, not a *decoction*.

1811. niſtering *ſavin* to a woman *not* quick with child, for the purpoſe of procuring abortion. (*a*)

The firſt count of the indictment charged that the priſoner on the 10th day of January 1811, and on divers other days and times between that day and the 20th of March in the year aforeſaid, at the pariſh of St. Mary's in the county of Monmouth, wilfully, maliciouſly, unlawfully and feloniouſly did adminiſter to and cauſe to be adminiſtered to and taken by one *Hannah Mary Goldſmith*, ſingle woman, divers large quantities, that is to ſay, 6 ounces of the *decoction* of a certain ſhrub called *Savin*, then and there being a noxious and deſtructive thing, the ſaid *H. M. G.* on the ſaid 10th day of January in the year aforeſaid, and continually from thence until the ſaid 20th day of

(*a*) The act provides that if any perſon or perſons ſhall wilfully and maliciouſly adminiſter to, or cauſe to be adminiſtered to or taken by any woman any medicines, drug or other ſubſtance or thing whatſoever, or ſhall uſe or employ or cauſe or procure to be uſed or employed, any inſtrument or other means whatſoever with intent thereby to cauſe or procure the miſcarriage of any woman not being or not being proved to be quick with child at the time of adminiſtering ſuch things, or uſing ſuch means, that then and in every ſuch caſe, the perſon or perſons ſo offending, their counſellors, aiders, and abettors, knowing of and privy to ſuch offence, ſhall be and are hereby declared to be guilty of felony, and ſhall be liable to be fined, impriſoned, ſet in and upon the pillory, publicly or privately whipped, or to ſuffer one or more of the ſaid puniſhments, or to be tranſported beyond the ſeas for any term not exceeding fourteen years, at the diſcretion of the Court before which ſuch offender ſhall be tried and convicted.

March

March in the year aforeſaid, at &c. aforeſaid, being with child, but not quick with child, to wit, at the reſpective times of adminiſtering ſuch divers large quantities of the *decoction* of the ſaid ſhrub called *Savin* as aforeſaid, with intent thereby to cauſe and procure the miſcarriage of the ſaid *H. M. G.*, againſt the form of the ſtatute, &c. 1811.

It appeared that the priſoner prepared the medicine which he adminiſtered to Miſs *Goldſmith* by pouring boiling water on the leaves of a ſhrub: and the medical men examined, ſtated that ſuch a preparation is called *an infuſion* not *a decoction*,—which is made by boiling the ſubſtance in the water.

The priſoner's counſel inſiſted that he was entitled to an accquittal on the ground that the medicine was miſdeſcribed.

Lawrence, J. That objection will not hold. The infuſion and decoction are *ejuſdem generis*, and the variance is immaterial. The queſtion is, whether the priſoner adminiſtered any matter or thing to this woman with intent to procure abortion.

Witneſſes were called for the priſoner to prove that the ſhrub he uſed was not *ſavin*.

Upon an indictment on 43 Geo. 3. c. 58. §. 2, charging that the priſoner adminiſtered to a woman with child but not quick with child, for the purpoſe of procuring abortion, a large quantity of a certain "mixture to the jurors unknown, then and there being a noxious and deſtructive thing," it is unneceſſary to prove that the mixture was noxious or deſtructive, or even that the woman was actually with child.

The

1811.

The counsel for the prosecution, insisted, that even in that case the prisoner might be found guilty upon the last count of the indictment, which charged that he administered a large quantity "of a certain mixture to the jurors unknown, *then and there being a noxious and destructive thing.*"

The prisoner's counsel objected that unless the shrub was *savin*, there was no evidence that the mixture was "noxious and destructive."

Lawrence J. In an indictment on this clause of the statute, it was improper to introduce these words; and although they are introduced, there is no necessity to prove them. It is immaterial whether the shrub was *savin* or not, or whether or not it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute, and he is guilty of the offence laid to his charge.

The prisoner urged that he had given the young woman an innocent draught for the purpose of amusing her, as she had threatened to destroy herself, unless enabled to conceal her shame; and the Jury returned a verdict of *not guilty*.

The prisoner had been previously tried on the *first* section of the statute (*a*) for the capital charge, in

The words "*quick with child*," in the first section of 43 G. 3. c. 58., are to be understood in their popular sense, viz. when the woman has felt the child move within her.

(*a*) Whereby it is enacted that "if any person shall wilfully, maliciously and unlawfully administer to, or cause to be administered

administering savin to Miss *Goldsmith* to procure abortion, she being then quick with child. In point of fact, she was in the fourth month of her pregnancy. She swore, however, that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men in their examinations, differed as to the time when the fœtus may be stated to be quick, and to have a distinct existence; but they all agreed that in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception. 1811.

LAWRENCE J. said, this was the interpretation that must be put upon the words *quick with child* in the statute; and as the woman in this case had not felt the child alive within her before taking the medicine, — he directed an acquittal.

In the course of the trial the prisoner's counsel proved that there is not any such parish in the county of *Monmouth* as the parish of *St. Mary's* laid in the indictment.

Q. whether it be now necessary in an indictment for felony, to lay a *parish* within the county.

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minister'd to or taken by any of His Majesty's subjects, any deadly poison or other noxious and destructive substance or thing, with intent thereby to cause and procure the miscarriage of any woman *then being quick with child*, the offender shall suffer death as in cases of felony without benefit of clergy."

1811. dictment. — It was contended on the other ſide, that it is no longer neceſſary in ſuch an indictment to lay any pariſh, as the jury are to come from the body of the county.

LAWRENCE, J. ſaid he would ſave the point for the opinion of the Judges.

Hughes and *Gleed* for the proſecution.

Clifford and *Puller* for the priſoner.

HEREFORD.

CROWN SIDE. CORAM LE BLANC, J.

Wedneſday, Aug. 7.

REX *v.* GEORGE WINDOW.

Stat. 26 Hen. 8. c. 6. authoriſing the trial of felonies committed in Wales, in the next adjoining Engliſh county, extends to felonies ſubſequently created.

THE priſoner was tried before GRAHAM, B. at the laſt Lent Aſſizes for the county of *Hereford*, upon an indictment which charged, that on the 27th day of Auguſt in the 50th year of His Majeſty's reign, he had in his poſſeſſion, at *Llangeny* in the county of *Brecon*, twelve reams of paper, with a counterfeit mark of the ſtamp of His Majeſty's Exciſe Office on the covers or wrappers of the ſaid reams of paper, knowing the ſame to be counterfeited.

By 49 Geo. 3. c. 80. this offence is made a felony, punishable with seven years transportation.

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The prisoner's counsel contended that he could be legally tried upon this charge only in the county of *Brecon*, where it was alledged to be committed. They denied that 26 Hen. 8. c. 6. which provides that the felonies therein mentioned when committed in Wales may be tried in the next adjoining English county, extends to felonies created since the passing of that statute; and they relied mainly upon 26 G. 2. c. 19. which makes the plundering the effects of any vessel wrecked or in distress, felony without benefit of clergy, and which enacts by sect. 8. "that if the fact be committed in Wales, then the prosecution shall or may be carried on in the next adjoining English county."—Such a provision would have been wholly unnecessary had the statute of 26 Hen. 8. extended to the trial of all felonies, whether created before or after. Therefore, if the words of 26 Hen. 8. were equivocal, the more recent statute must be considered a legislative declaration, that it extended only to murders and such offences as were felonies when the act passed.

GRAHAM B. said he would save the point for the opinion of the Judges.—Accordingly, the prisoner being found guilty, judgment was respited till the present assizes.

The prisoner being now put to the bar,—

LE BLANC,

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LE BLANC, J. recapitulated the proceedings, and ſtated the objection taken by the priſoner's counſel. He then ſaid that this objection had been conſidered by the Judges, who were all of opinion that the ſtatute of 26 Hen. 8. extended to felonies ſubſequently created, and that the priſoner had been rightly tried for this offence in the county of *Hereford*. His Lordſhip concluded by ſentencing him to be tranſported for the term of 7 years.

Jervis, *Dauncey* and *Abbott* for the proſecution.

Bevan, *Gleed* and *Puller* for the priſoner.

Vide Rex v. Parry, 1 Leach C. C. 125. 2 Eaſt P. C. 773. S. C.

SHREWSBURY.

CORAM LE BLANC, J.

Tueſday, Aug. 13.

CHANDLER v. THOMPSON.

If an antient window be raiſed and enlarged, the owner of the adjoining land cannot lawfully obſtruct the paſſage of light and air to any part of the ſpace occupied by the antient window, although a greater portion of light and air be admitted through the unobſtructed part of the enlarged window than was anciently enjoyed.

THIS was an action on the caſe for ſtopping up a window in the plaintiff's dwelling houſe.

It

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It appeared that there had been for many years a ſmall window in the place in queſtion. About three years ago, the plaintiff conſiderably enlarged it, both in height and width, and put in a ſaſh frame inſtead of a leaded caſement. The defendant, who is the owner of the adjoining ground, then erected the building complained of, which completely covered ſeveral inches of the ſpace occupied by the old window, but ſtill admitted more light to paſs through the new window than the plaintiff had enjoyed before the alteration.

Jervis for the defendant, inſiſted that under theſe circumſtances the action could not be maintained. The plaintiff had only a right to ſo much light as he had appropriated by 20 years' enjoyment; and more than that was ſtill left to him. Though the defendant might not object to a ſmall window looking into his yard, a larger one might be very inconvenient to him, by diſturbing his privacy, and enabling people to come through to treſpaſs upon his property. But he could only reduce the window to its ancient ſize by building from below; and a part of the ſpace occupied by the old window was thus neceſſarily obſtructed.

LE BLANC, J., however, was of opinion that the whole of the ſpace occupied by the old window was privileged, and that it was actionable to prevent the light and air from paſſing through this as it had formerly done. That part of the new window which conſtituted the enlargement might be lawfully obſtructed, but the plaintiff was entitled to the free

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admiſſion of light and air through the remainder of the window, without reference to what he might derive from other ſources. — His lordſhip likewiſe obſerved, that although an action for opening a window to diſturb the plaintiff's privacy was to be read of in the books, he had never known ſuch an action maintained, and when he was in the Common Pleas he had heard it laid down by Lord C. J. EYRE that ſuch an action did not lie, and that the only remedy was to build on the adjoining land, oppoſite to the offenſive window.

The plaintiff had a verdict.

Dauncey and *Puller* for the plaintiff.

Jervis and *Campbell* for the defendant.

Vide Martin v. Goble, 1 Campb. 322.

ADJOURNED SITTINGS AT GUILDHALL.

Before Michaelmas Term,

52 GEORGE III.

1811.

Tuesday, October 29.

GRONING *v.* CROCKETT.

POLICY of insurance on goods by the *Fortuna*, from London to the Baltic. The ship was in fact bound for *Riga*, and sailed from London in the summer of 1810. Meeting with stormy weather, she was obliged to put into *Memel*, where she was detained by contrary winds, and seized in the month of December. There was a British licence for the voyage, which was to be in force till the 29th of September.

Where a licence is granted for a voyage to a hostile country, to continue in force till a given day, if the voyage is *bonâ fide* begun before that day, it continues to be protected by the licence though delayed beyond the day by stress of weather or other accident over which the assured have no controul.

Park, for the defendant, objected, that after that day the assured were engaged in an illegal adventure, and the policy was void.—But

Lord ELLENBOROUGH held, that the voyage having commenced before the 29th of September, and the ship having afterwards been detained by stress of wea-

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ther, the licence operated as a remiſſion of the King's rights of war till the adventure was completed, and preſerved the legality of the policy of inſurance.

Verdict for the plaintiff.

Garrow and *Marryat* for the plaintiff.

Park and *Jervis* for the defendant.

So where there is a policy "*at and from*," if the ſhip has her cargo on board and is ready to ſail before the day when the licence expires, although ſhe is detained in port till after the day by contrary winds, the policy remains valid. *Schroder* v. *Vaux*. *Same Sittings*. Policy "at and from Archangel to London." Licence to remain in force till 29th September. The ſhip had her cargo on board, and was ready to ſail before that day, but was prevented by contrary winds.

Lord ELLENBOROUGH overruled an objection taken on this ground at *niſi prius*, and the Court afterwards refuſed a rule to ſhew cauſe upon it, — ſaying that the adventure could not become illegal although not conſummated before the day mentioned in the licence; that if the policy had not attached before that day, the law might be otherwiſe; but here the policy at Archangel had attached before the 29th of September; and that it was exactly the ſame as if the licence had expired the day before the ſhip reached the port of London.

The ſame conſtruction has been put upon theſe licences in the Court of Admiralty, and Sir William Scott has laid it down as *a general rule* "that where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the licence into literal execution by a power which they could not controul, they ſhall be entitled to the benefit of its protection, although the terms may not have been

been literally and ſtrictly fulfilled." *Gode Hoop, Pieters, Edwards's Caſes on Licences*, 6. Accordingly, in one inſtance where a ſhip had been detained under an embargo at *Charente* near two years after the licence had expired, he ordered the property to be reſtored. *Johan Pieter, Schwartz, ib.* 28. But in all caſes where ſhips trading with the enemy have been brought in after the time mentioned in their licences had expired, the captors have been allowed their expences.

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HORNEYER *v.* LUSHINGTON.

Friday, Nov. 1

If a ſhip inſured is condemned for carrying ſimulated papers contrary to the law of nations, without having any liberty in the policy to do ſo, the underwriters are diſcharged.

THIS was an action on a policy of inſurance on the Ship *Amelia* and her cargo, "at and from *Gottenburgh* to *Riga*." The intereſt was laid in the plaintiff, who is a Swediſh ſubject reſiding at *Gottenburgh*, and a total loſs was averred to have happened from the ſeizure and detention of the ſhip and cargo by the Ruſſian government. The ſhip took in her cargo in the port of London, touched at *Gottenburgh*, and arrived at *Riga* the 22d of September 1809. *Sweden* and *Ruſſia* being then at war, ſhe carried ſimulated papers, repreſenting that ſhe came from *Bergen* in *Norway*, and had taken in her cargo there. Theſe papers, upon her entering the harbour of *Gottenburgh*, were delivered by the Captain at the cuſtom houſe, and were immediately ſealed up and forwarded to *Peterſburgh*. In the mean time, the ſhip's hatches were ſealed down, and an officer of government remained conſtantly on board. At the end of 12 days

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orders were received from the Emperor of *Ruſſia* to put the ſhip and cargo under ſequeſtration. They were accordingly ſeized on the part of his Imperial Majeſty, and never reſtored.—This was the plaintiff's caſe.

The defendant's counſel put in the ſentence of "The St. Peterſburgh Committee of Neutral Navigation," by which the ſhip and cargo were condemned. The ſentence, after reciting that the Captain had exhibited a bill of health and other papers as if from *Bergen;* that theſe were diſcovered to be falſe and counterfeited; and that the ſhip and cargo being put under ſequeſtration, proceedings had been inſtituted againſt them, "laid down for a baſis; 1. That the *Bergen* bill of health was illegal and unjuſtifiable; 2. That this vitiated the reſt of the ſhip's papers, and proved that ſhe had not come from *Bergen;* 3. That the claim of the Ruſſian government to the ſaid ſhip and cargo was founded on the right of war, the ſaid veſſel having violated the laws of neutrality in bringing to a Ruſſian port a cargo the property of an enemy concealed under falſe documents; 4. That the ukaſe of the 14th May 1809, was infringed by the muſter-roll iſſued at *Bergen* being falſe and fabricated; 5. That the requeſt for the veſſel to be expelled the ports of *Ruſſia* is inadmiſſible, ſhe having arrived at *Riga* in violation of the laws of neutrality, which act ſubjected her to be treated in conformity to the maritime laws which preſcribe the confiſcation of all ſhips and cargoes furniſhed with falſe papers." The ſentence then ſtates

ſtates that "the committee taking into conſideration theſe circumſtances as well as the principal points of the ſaid maritime law, and the imperial decree of 14th May 1809, as relating thereto; regarding alſo the opinions of claſſical authors moſt favourable to neutrality, have unanimouſly reſolved, that the ſhip *Amelia* commanded by Captain *Sagert*, arrived *at Riga* with a cargo of goods purporting by the bills of lading to have been ſhipped at *Bergen*, be condemned together with her rigging and appurtenances for the benefit of the crown, as alſo the whole of the cargo &c."

Garrow for the defendant, contended, that as the policy contained no liberty to carry ſimulated papers, and as the ſhip and cargo had been condemned for the carrying of ſimulated papers contrary to the law of nations, the underwriters were diſcharged.

The *Attorney General*, contrà, inſiſted that the ſhip in this voyage had a right to carry ſimulated papers without any expreſs leave being given for that purpoſe. They were uſed as the means of ſafety. Without them the ſhip and cargo muſt have been inevitably condemned. *Sweden* and *Ruſſia* being at war, had a *Swediſh* ſhip acknowledging herſelf to have come from *Gottenburgh* ſailed into the port of *Riga*, ſhe would have gone to certain deſtruction. Then it might have been ſaid, that the aſſured had themſelves cauſed the loſs, and therefore could not reſort to the underwriters for an indemnity. From the nature of the

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risk, it must have been perfectly well understood between the parties that simulated papers were to be used; and for that reason no express liberty to use them appears upon the face of the policy. The underwriters never would have signed the policy unless in the expectation that such means would be employed to protect the ship and cargo. There is no imputation of fraud. It must be admitted that the sole object of the assured was the protection of the property, in which the underwriters had an equal interest; and that the course they pursued was the best adapted that could have been devised for that purpose. But it may be laid down as a principle, that the assured acting bonâ fide, have a right to do whatever is necessary for the preservation of the subject matter insured. Suppose an enemy heaves in sight, may not a ship hoist false colours? May she not display the flag of an enemy, or any neutral flag, as will best answer the purpose of deception, and favour her escape? Might she not do the same if she were driven by stress of weather into an enemy's port? What is the difference between using false *papers* and false *colours?* Is it not equally the duty of the captain to protect the ship and cargo in the port of destination as in a port where he seeks for shelter from the violence of the elements?

Lord ELLENBOROUGH. — I am of opinion that the underwriters are not liable in this case, as the assured must be considered the efficient cause of the loss, by an act which is in itself illegal, and for which no

liberty is given in the policy. In deference to decided cases, I am bound to believe that the ground alleged in the ſentence of condemnation is that upon which the ſeizure and confiſcation proceeded. By this ſentence, the ſhip and cargo are condemned for a breach of the law of nations in carrying fabricated papers. The object for which they were carried is immaterial, the thing being unlawful, and done without the defendant's conſent. The liberty to carry ſimulated papers is now frequently expreſſed in policies of inſurance, and ought to have been ſo in this inſtance, if ſuch means were to be reſorted to for protecting the ſhip and cargo. From the ſtate of hoſtility between *Sweden* and *Ruſſia* it does not neceſſarily follow that the parties contemplated the uſe of ſimulated papers. The underwriters might as naturally have ſuppoſed that the voyage would be protected by a licence from the Ruſſian government. The aſſured is juſtified only in doing *what is lawful* for the preſervation of the ſhip and cargo. Here the ſentence alleges that the captain, who is the agent of the aſſured, was guilty of a breach of the law of nations, and on that ground does the condemnation proceed. Who induced the loſs? The aſſured. And that being ſo, it would be contrary to the firſt principles of inſurance law if he were allowed to recover.

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In the courſe of the trial it was likewiſe debated, whether the policy on the goods had attached, they being loaded at *London* not at *Gottenburgh*; if not, whether the plaintiff was entitled to a return of premium; and whether

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whether the policy on the ſhip had not expired, as ſhe had been moored 24 hours in good phyſical ſafety at *Riga* before the ſeizure.

A verdict was given for the defendant, with leave to move upon any of theſe points.

In the enſuing term the *Attorney General* brought them all before the Court. Lord ELLENBOROUGH and the other Judges were clearly of opinion, that the underwriters were diſcharged by the ſentence of condemnation, and would only grant a rule to ſhew cauſe why a verdict ſhould not be entered for the plaintiff for the amount of the premium to be returned for ſhort intereſt, if the policy on the goods never attached. — In Hilary term following the rule in this ſhape was made abſolute, the Judges all concurring in the authority of the caſe of Spitta v. Woodman, 2. Taunt. 416.

The *Attorney General*, *Park*, and *Holroyd* for the plaintiff.

Garrow, *Scarlett*, and *Campbell* for the defendant.

[Attornies, *Gatty* and *Blunt*.]

Vide Bell v. Carſtairs, 14 Eaſt 374.

REX

1811.
Saturday, Nov. 2.

REX *v.* CHAPPLE.

A member of the Barbers Company in the City of London, is not exempted from ſerving the office of conſtable.

THIS was an indictment againſt the defendant for refuſing to take upon himſelf the office of conſtable for the precinct of *St. Faith under St. Paul's*, in the Ward of *Farringdon-within*, in the city of London.

The defendant, a trunk-maker by trade, claimed an exemption from ſerving this office as being a member of the *Barbers Company*.

Marryat, as his counſel, now contended that upon the conſtruction of 3 Hen. 8. c. 11.—5 Hen. 8. c. 6. and 32 Hen. 8. c. 42., the exemption from ſerving offices of this ſort originally granted to the *Surgeons Company* not exceeding twelve, was extended to all the members of the *Barbers Company* when the two were united.—But

Lord ELLENBOROUGH was of opinion that the exemption was confined to ſuch as had been examined by the Biſhop of London, or Dean of St. Pauls, and licenced to practice ſurgery according to the proviſions of the ſtatutes cited.

The defendant was found guilty.

The

The *Attorney General*, *Garrow*, and *Bolland* for the profecution.

Marryat for the defendant.

[Attornies, *Newman* and *Hufsey*.]

1811:
Thurſday, November 5.

Barrow v. Coles.

By a bill of lading, goods are deliverable to J. S. if he ſhould accept and pay a bill of exchange;—if not, to the holder of the ſaid bill of exchange.—J. S. accepts the bill of exchange, and indorſes the bill of lading for a valuable conſideration; but does not pay the bill of exchange when due.—Held, that upon its diſhonour, the property of the goods veſted in the holder of it, and that he might maintain trover for the goods againſt the indorſee of the bill of lading.

TROVER for 100 bags of coffee.

On the 20th March 1810, *Norton & Fitzgerald* at Demarara, drew a bill of exchange upon *Voſs* in London, payable to their own order, and indorſed it to the plaintiff, at the ſame time annexing to it a bill of lading of the coffees in queſtion, with an indorſement upon it, making them deliverable to *Voſs* if he ſhould accept and pay the draft, if not, to the holder of the ſaid draft.

The bill of exchange and bill of lading being ſent to *Voſs*, he accepted the former, and detached the latter from it. He then indorſed the bill of lading for a valuable conſideration to the defendant; but he did not pay the bill of exchange.

Lord Ellenborough held, that the ſpecial indorſement on the bill of lading ought to have made the defendant inquire whether the condition on which the

the coffees were deliverable to *Voſs* had been fulfilled, and that after the diſhonour of the bill of exchange, the property in the coffees veſted in the plaintiff, — who had a verdict accordingly.

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BARROW
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v.

Park and *Lawes* for the plaintiff.

Garrow and *Gurney* for the defendant.

[Attornies, *Street* and *Walton*.]

Vide Coxe v. Harden, 4 Eaſt, 211.

HOBBS v. HANNAM.

Tueſday, Nov. 5.

THIS was an action on a policy of inſurance on the ſhip *Jane*, valued at 3600*l.* "at and from Rio Janeiro to any port or place in the River Plate, and from thence to her port of diſcharge in Great Britain or Ireland."

Where it is ſtipulated by a charter party, that in caſe the ſhip is loſt during the voyage, the charterer ſhall pay the owner a ſum of money which is eſtimated as the value of the ſhip, the owner has ſtill an inſurable intereſt in the ſhip during the voyage.

The ſhip was the property of the plaintiff, and was chartered by him to one *Woodman*, who covenanted by the chartyparty that in caſe the ſhip was loſt he ſhould pay the plaintiff 3600*l.* *Woodman* addreſſed the ſhip to one *Kendal* at *Rio Janeiro*, whoſe orders he deſired the captain *implicitly to obey*.

When the ſhip reached *Rio Janeiro* ſhe was ordered by *Kendal's* partner to proceed to *Buenos Ayres*, where *Kendal* himſelf then was. Upon her arrival at the latter

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latter place, *Kendal* ſent ſmuggled goods on board; for which ſhe was ſeized and condemned by the Spaniſh government.

Garrow for the defendant, firſt objected that the plaintiff had not an inſurable intereſt in the ſhip, as he had a right to recover the 3600*l.* from *Woodman* the charterer. —

Lord ELLENBOROUGH held, that he was not bound to truſt excluſively to the credit of the charterer; but might likewiſe protect himſelf by a policy of inſurance.

If a chartered ſhip be loſt by means of the captain engaging in an illegal trade in obedience to the orders of the charterer, this is not a loſs by barratry for which the owner of the ſhip can recover againſt the underwriters.

Garrow then contended, that this was a loſs which had ariſen directly from the act of the aſſured; and for which the underwriters therefore could not be liable.

Marryat, contrà, inſiſted that this was a loſs by *barratry*. The charterparty gave no leave to go to *Buenos-Ayres*, and the maſter ought not to have gone there, the voyage being illegal. He might mean to do the beſt he could for his employer; but within the late caſe of *Earl* v. *Rowcroft* (*a*), his act being illegal, was nevertheleſs barratrous. It could not be ſaid he had acted in obedience to the owner of the ſhip. The plaintiff was the owner of the ſhip, and *Kendal* was not his agent, but the agent of *Woodman* the charterer.

Lord ELLENBOROUGH. — I clearly think the loſs is to be imputed to the plaintiff himſelf. If I give the

(*a*) 8 Eaſt, 126.

dominion of my ſhip to a charterer, his acts are my acts; and in this caſe *Kendal*, whoſe orders the maſter implicitly obeyed according to his inſtructions, was in point of law the agent of the plaintiff. Therefore the loſs aroſe from following his own orders, an there is no pretence for imputing it to *barratry* (*a*).

The paintiff was nonſuited.

To obviate the difficulty of the voyage to the river Plate being illegal, it was mentioned during the trial, that although the ſhip ſailed without any licence, a retroſpective licence from the South Sea Company was obtained afterwards.

Semble that after a ſhip has ſailed on a voyage to a place within the limits of the S. S. Company, a retroſpective licence granted by the Company, is inſufficient to legalize the voyage.

Lord ELLENBOROUGH ſaid he was inclined to think this was inſufficient to purge the illegality, the forfeiture not being excluſively to the Company, but partly to the crown, and partly to the common informer (*b*).

Marryat and *Nolan* for the plaintiff.

Garrow, *Jervis*, *Gurney*, and *Abbott* for the defendant.

[Attornies, *Paſmore* and *Reardon*.]

(*a*) But where a ſhip is let to freight, a deviation for an illegal purpoſe, without the knowledge of the freighter, is barratry as to him, although it be with the conſent of the original owner. Vallejo *v.* Wheeler, Cowp. 143.

(*b*) *Vide* 9 Ann. c. 21. § 49. — Toulmin *v.* Anderſon, 1 Taunt. 227.

REX

1811.

Tuesday, Nov. 5.

REX *v.* PUNSHON.

Semble that on an indictment against a bankrupt for perjury before the commissioners in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy.

THIS was an indictment for perjury, charged to have been committed by the defendant in passing his last examination before the commissioners named in a commission of bankrupt before then issued against him.

The indictment alleged that the defendant was in due manner found and declared a bankrupt, and that the commissioners had sufficient power and authority to administer an oath to him upon the occasion in question.

To support these allegations, the counsel for the prosecution put in the commission of bankrupt and the proceedings under it, and proved the handwriting of the commissioners to the adjudication of the defendant having become bankrupt.

It was contended on the other side, that they were bound to give strict evidence of the trading, petitioning creditors debt and act of bankruptcy.

The counsel for the prosecution answered that while the commission subsisted and was not superseded by the Lord Chancellor, it must be taken to be legal and valid, and credit must be given to the proceedings of the commissioners under it, as founded upon sufficient grounds.

grounds. They had found and declared the defendant a bankrupt, and the Court must presume that they did so duly, at least till the contrary appeared. The indictment alleged, not that the defendant was a bankrupt, but that he was duly found and declared a bankrupt, which the proceedings abundantly testified.

Lord ELLENBOROUGH.—I am strongly inclined to think that you ought to give strict evidence of the bankruptcy. Unless the defendant really was a bankrupt, the examination was unauthorised. It goes to the authority of the commissioners to administer the oath. Their authority takes its root, not in the commission, but in the bankruptcy. While the commission subsists, its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt, all falls to the ground. However, I will save the point.

The defendant was acquitted on the merits.

The *Attorney General* and *Gurney* for the prosecution.

Garrow and *Marryat* for the defendant.

[Attornies, *Bell* and *Harmer*.]

Vide Rex v. Bullock, 1 Taunt. 71.

1811.
Tuesday, Nov 5.

REX v. WHITE.

On the trial of a misdemeanor, the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury: but if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the Court will hear this argued by his counsel.

THIS was an information by the Attorney General for a libel in a newspaper called *The Independent Whig*.

When the first witness for the crown had been examined in chief, —

A Gentleman at the bar said, he had received a brief on behalf of the defendant instructing him to examine and cross-examine the witnesses, and to argue any point of law that might arise in the course of the trial; but stating that the defendant reserved to himself the right of addressing the jury. The same course had been pursued in the case of *Redhed Yorke*, who was tried at the York Assizes before Mr. Justice ROOKE. By the permission of that Judge, the defendant there had counsel, who examined some of the witnesses; he examined others himself, and he delivered an address to the jury.

Lord ELLENBOROUGH.—I do not exactly remember what indulgence was granted to the defendant in that case; and I do not feel myself bound by it as a precedent. I am afraid of the confusion and perplexity which would necessarily arise, if a cause were to be conducted at the same time both by counsel and by the party himself. I am extremely anxious that a

perſon accuſed ſhould have every aſſiſtance in making his defence; but I muſt likewiſe look to the decent and orderly adminiſtration of juſtice. I therefore cannot allow counſel to examine witneſſes for the defendant, if he is likewiſe to put queſtions to them himſelf and afterwards to addreſs the jury. If in the courſe of the trial, any point of law ariſes which he declares himſelf incompetent to argue, I will be very ready to hear it diſcuſſed by his counſel, although he conducts the defence himſelf. I will do in this reſpect as was done formerly in capital caſes, when the aſſiſtance of counſel was not permitted to the priſoner upon matters of fact. I think I cannot conſiſtently with my duty go farther; and ſurely there is no hardſhip in the rule I lay down. If the defendant has counſel to conduct his cauſe, he may ſuggeſt any queſtion to them which he conſiders fit to be put; or if he takes the conduct of it upon himſelf, he may have the benefit of their private ſuggeſtions upon matters of fact; and as ſoon as any point of law ariſes, they ſhall be readily heard upon it.

The trial then proceeded, the defendant himſelf croſs-examining the witneſs.

To prove the defendant to be proprietor of the newſpaper, the counſel for the crown at firſt, under 38 Geo. 3. c. 78. gave in evidence a certified copy of an affidavit purporting to have been ſworn at Dorcheſter "before J. Whitaker, a diſtributor, &c.,"—without be-

To render the certified copy of the affidavit made by the proprietor of a newſpaper evidence under 38 Geo. 3. c. 78. it muſt either appear upon the *jurat* that the perſon before whom it was made, had authority to take it, or this fact muſt be proved *aliunde*.

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REX
v.
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ing prepared to shew that Whitaker had authority from the commissioners of stamps to take the affidavit.

The defendant objecting that this was insufficient, the point was argued by his counsel, and the counsel for the crown.

Lord ELLENBOROUGH said, if the *jurat* had purported that Whitaker had authority, he would not have required evidence of that fact; but without such evidence, this certificate was insufficient under the statute.

But it is sufficient evidence of publication at common law, to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title containing the libel was purchased there.

The counsel for the crown then proceeding at common law, gave in evidence the original affidavit signed by the defendant, stating that he was sole proprietor of the newspaper in question, and that it was to be published at *No.* 32. *Warwick Court*, together with a copy of *The Independent Whig* containing the alledged libel which had been purchased there.

Lord ELLENBOROUGH held this to be sufficient evidence of publication.

The defendant afterwards addressed the Jury, who brought in a verdict of

Not guilty.

Vide Rex v. Hart, 10 East, 94.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Michaelmas Term,

52 GEORGE III.

THIRD SITTINGS IN TERM IN LONDON.

1812.

Wednesday, Nov. 27.

THOMPSON and Another *v.* MORGAN.

A bill of exchange payable to the order of the drawer, in an action by him againſt the acceptor, is good evidence under the money counts.

THIS was an action againſt the defendant as acceptor of a bill of exchange for 81*l.* value received, drawn by the plaintiffs, payable to their own order.

Campbell for the plaintiffs, pointed out a variance between the ſpecial count and the terms of the bill; but offered it in evidence under the money counts.

Lord ELLENBOROUGH at firſt doubted, whether this could be done, it having been held that *indebitatus aſſumpſit* will not lie againſt the acceptor of a bill of exchange.

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THOMPSON and Another v. MORGAN.

Campbell contended that this rule only applies where there are three parties to the bill, and the action is brought by the payee or an indorſee. In that caſe the law ſuppoſes that the original money tranſaction was between the payee and the drawer; the value is conſidered as received by the drawer; the acceptor is merely a ſurety, and there is no privity or conſideration between him and the payee. But here where the drawer and payee are the ſame, and there are only two parties to the inſtrument, it is to all intents and purpoſes the ſame as a promiſſory note, which has been held to be good evidence to ſupport a count for money lent, for money had and received, and upon an account ſtated. The *value* mentioned in the bill muſt have paſſed from the plaintiffs to the defendant, and primâ facie muſt be taken to be money. The bill therefore proved either that 81*l.* had been lent by the plaintiffs to the defendant, or that the defendant had in his hands 81*l.* to the plaintiffs' uſe, or that upon a ſtatement of accounts, a balance of 81*l.* was found to be due from the defendant to the plaintiffs.

Lord ELLENBOROUGH admitted the bill as evidence under the count for money had and received; but would allow no intereſt.

The action was undefended.

Vide Boughton v. Frere, ante 29.

FIRST

FIRST SITTINGS AFTER TERM IN LONDON.

1811.

Saturday, Nov. 30.

RODERICK *v.* HOVIL.

Although a policy of insurance produced at the trial of an action has a sufficient stamp, evidence will be received that it had no such stamp when it was effected, in which case it is a mere nullity, though stamped afterwards by order of the commissioners of stamps; for this is forbidden by 35 G. 3. c. 63., and not authorized by 37 G. 3. c. 136. which extends only to such instruments as could before be legally stamped after they were executed.

THIS was an action by an insurance broker, to recover the sum of 65*l.* 11*s.* 6*d.* due for premiums &c. upon a policy of insurance effected by him for the plaintiff.

The policy was on a ship called the *Countess of Cardigan*, from London to Shields and back to London, for 3 months, in the coasting trade, from 15th February 1810.

In a former action for the same cause, it appeared that the policy had not the proper stamp, and the plaintiff was nonsuited. Since then, the commissioners of stamps had permitted the proper stamp to be affixed to it, on the payment of a penalty.

Puller for the defendant insisted, that the commissioners had no power to do so, and that the instrument was still a nullity. He relied upon 35 Geo. 3. c. 63. § 14. 16. (*a*)

Garrow

(*a*) Whereby it is enacted, that no Insurance made or entered into in Great Britain in respect whereof any duty is by this

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RODERICK v. HOVIL.

Garrow for the plaintiff ſubmitted, that as the inſtrument now appeared to be properly ſtamped, the Court would not inquire when the ſtamp was affixed, and that even if the commiſſioners had exceeded their

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this act made payable nor any contract, or agreement for ſuch inſurance as aforeſaid, ſhall be pleaded or given in evidence in any Court, or admitted in any Court to be good, uſeful or available in law or in equity, unleſs the vellum, parchment or paper on which ſuch inſurance ſhall be engroſſed, printed or written, ſhall be ſtamped with a lawful ſtamp, to denote the rate or duty as by this act is directed, or to denote ſome higher rate or duty in this act contained, and it ſhall not be lawful for the ſaid commiſſioners of the ſaid ſtamp duties, or any of their officers, to ſtamp any vellum, parchment, or paper, with any ſtamp directed to be provided or uſed by virtue of this act, at any time after any ſuch inſurance as aforeſaid or contract for ſuch inſurance ſhall be engroſſed, printed, or written thereon, under any pretence whatever. And that it ſhall not be lawful for any broker, agent, ſcrivener, or other perſon, tranſacting, making, or negociating any ſuch inſurance, as is herein before mentioned, to charge or ſet againſt his employer or employers, any ſum of money for brokerage or agency, or for his pains or labour, in tranſacting, making, or negociating ſuch inſurance, or engroſſing, printing, or writing the ſame, or for any ſum of money expended or paid by way of premium, or conſideration in the nature of a premium, for ſuch inſurance, unleſs the ſame ſhall be engroſſed, printed, or written on vellum, parchment, or paper, duly ſtamped according to the directions of this act, or upon vellum, parchment, or paper, ſtamped with a ſtamp or ſtamps of higher denomination or value than is by this act required; and all and every ſum and ſums whatever, paid by ſuch employer or employers, on on any ſuch account, to any broker, agent, ſcrivener, or other perſon aforeſaid, tranſacting, making, or negociating any inſurance contrary to this act, ſhall be deemed to be paid with out conſideration, and ſhall remain the property of ſuch employer or employers, his, her or their reſpective executors, adminiſtrators, or aſſigns

authority and were liable to cenſure, the ſtamp could not be deprived of its legal efficacy. But—

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Lord ELLENBOROUGH ſaid the ſtatute was imperative upon him, and that as the policy was not duly ſtamped before it was effected, the broker could not recover any thing for effecting it.

Garrow then contended, that the commiſſioners were authorized to reſtamp this policy by the ſubſequent ſtatute of 37 Geo. 3. c. 136. § 2. (*a*) the object of which muſt have been to enable them to give validity to an inſtrument on payment of a penalty, where

(*a*) 37 G. 3. c. 136. § 2. enacts, "that where any ſkin or piece of vellum, or parchment, or ſheet or piece of paper, on which any matter or thing, (except bills of exchange, promiſſory notes or other notes, drafts or orders,) ſhall have been engroſſed, printed, or written, ſhall be brought to the commiſſioners to be ſtamped after the ſame ſhall have been executed, the ſame not having been ſtamped with any ſtamp, or having been ſtamped with a ſtamp of leſs value than is by law required, and the perſon producing the ſame is deſirous of having the ſame duly ſtamped; but the ſame cannot according to the laws in force be ſtamped without payment of accumulated penalties exceeding ten pounds beſides the duty; that then and in every ſuch caſe it ſhall and may be lawful for the ſaid commiſſioners, or the major part of them, to direct the proper officer or officers, and ſuch officer or or officers is and are hereby required to ſtamp the ſame, on payment of the duty by law payable for ſuch vellum, parchment, or paper in reſpect of the inſtrument, matter, or thing engroſſed, printed, or written thereon, and one penalty of ten pounds only for every ſuch ſkin or piece of vellum, or parchment, or ſheet or piece of paper.

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as in the preſent inſtance, the original ſtamp was inſufficient through a mere miſtake.

Lord ELLENBOROUGH, however, was of opinion that this ſtatute only applied to the accumulated penalties upon ſtamping ſuch deeds and writings as could before be legally ſtamped after they were executed, and that as a policy of inſurance was not of that number, the ſtamp that had been impreſſed on this inſtrument ſince the former trial was of no avail.

Plaintiff nonſuited.

Garrow and *Lawes* for the plaintiff.

Puller for the defendant.

[Attornies, *Wild* and *Sayer*.]

The ſame doctrine as to the inefficacy of a ſtamp affixed to a policy of inſurance after it is effected, was laid down by the court of K. B. in *Rapp* v. *Allnutt*, E. T. 1812, in which it was held that where there is a policy on goods to be thereafter declared and valued, and ſeveral diſtinct intereſts are afterwards declared and valued, the policy is void, if it has not a ſtamp ſufficiently large to cover the whole value declared, calculating the fractional ſum of each diſtinct intereſt as 10*l*.

AD-

ADJOURNED SITTINGS AT WESTMINSTER.

1811.

Tuesday, Dec. 3.

BAKER *v.* BIRCH.

THIS was an action againſt the defendant, as drawer and indorſer of a bill of exchange for 23*l.*

A few days before a bill of exchange becomes due, the acceptor informs the drawer, he will be unable to pay it, ſays the drawer muſt take it up, and gives him part of the amount to aſſiſt him in doing ſo: The drawer receives the money and promiſes to take up the bill accordingly. — *Held* that in an action by the indorſee againſt the drawer, the latter might nevertheleſs ſet up as a defence, that the bill was not duly preſented for payment, and that he had not regular notice of its diſhonour; but that the ſum paid him by the acceptor, was money had and received to the plaintiff's uſe.

It appeared that a few days before the bill became due, the acceptor went to the defendant; told him he ſhould not be able to take it up; ſaid the defendant muſt do ſo; and gave him five guineas, being all the money he could command, for that purpoſe. The defendant received the five guineas, and promiſed to take up the bill. The bill was not preſented for payment to the acceptor till ſome days after it had been due, and the defendant had not regular notice of its diſhonour.

Marryat for the plaintiff contended, that after the defendant had been informed that the bill would be diſhonoured, and had promiſed to take it up, he could not ſet up the want of notice as a defence; and at any rate, the plaintiff was entitled to recover the 5*l.* 5*s.* as money had and received to his uſe; — for which he cited *De Bernales v. Fuller*, 2 *Camp.* 426.

Topping, contrà, inſiſted, that the information of the diſhonour of a bill muſt be communicated to the drawer

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BAKER v. BIRCH.

drawer by the holder; and that the promiſe here being on the implied condition that the defendant had due notice of the diſhonour of the bill, he was not even bound to pay the plaintiff the *5l. 5s.*, but had a right to apply that ſum in ſatisfaction of a debt due to himſelf from the acceptor.

Lord ELLENBOROUGH. was of opinion that the defendant was diſcharged upon the bill for want of due notice; but that the plaintiff was entitled to recover the *5l. 5s.* as money had and received to his uſe.

Verdict accordingly.

Marryat and *Campbell* for the plaintiff.

Topping for the defendant.

[Attornies, *Williams* and *Lockett*.]

Tueſday, Dec. 3.

WM. PRICE *v.* HARWOOD.

If a perſon whoſe real name is *William* is aſked before proceſs iſſues againſt him, whether his name is not *John*, and he ſays it is, he cannot maintain treſpaſs for what is done in execution of the proceſs againſt him by the wrong name.

TRESPASS for breaking and entering the plaintiff's houſe and ſeizing his goods. Plea, *not guilty*.

The treſpaſs being proved, the defendant by virtue of an act of parliament for eſtabliſhing a court of conſcience, gave in evidence under the general iſſue, that proceſs iſſued from the court againſt the goods of *John* Price; that the preſent plaintiff was the perſon meant

meant in the proceſs, and liable to pay the money; that though his name be *William*, he at one time had *John* Price written over his ſhop door, and that being aſked before the proceſs in queſtion was ſued out, whether his name was *John*, he ſaid it was, and they might diſtrain upon him and be d——d. The proceſs was accordingly ſued out againſt him by the name of *John*, and the defendant entered his houſe and took his goods in execution.

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Park for the plaintiff, cited *Cole* v. *Hindſon*, 6 T. R. 234. in which it was held, that to treſpaſs for taking the goods of A. B. a plea of juſtification by an officer, that he took them under a diſtringas againſt C. B. (meaning the ſaid A. B.) to compel an appearance, with an averment that A. B. and C. B. were the ſame perſon, could not be ſupported. So here the defendant could not have pleaded ſpecially that proceſs iſſued againſt *John* Price (meaning *William* Price), and therefore the ſame facts could be no defence under the general iſſue.

Lord ELLENBOROUGH.—Here the party was known as well by the one name as by the other, which was not averred to be the caſe in *Cole v. Hindſon* (*a*.) But beſides that, I think the plaintiff is barred by having ſaid that his name was *John*, when interrogated

(*a*) Per Lord Kenyon The averment in the plea that *Aquila* and *Richard* are the ſame perſon, will not aſſiſt the defendants, *as they have not alſo averred that the plaintiff was known as well by one name as by the other*. 6 T. R. 235.

before

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before the proceſs was iſſued. He ſhall not be allowed to avail himſelf of the miſtake which he himſelf occaſioned.

Plaintiff nonſuited.

Park and *Eſpinaſſe* for the plaintiff.

Garrow for the defendant.

[Attornies, *James* and *Smith*.]

So if the defendant neglects to plead a miſnomer in abatement, he may be taken in execution under a capias ad ſatisfaciendum by the wrong name. Crawford *v.* Satchwell, 2 Stra. 1218. But unleſs the party be known as well by one name as the other, or has by ſome act acknowledged himſelf to be the perſon meant in the writ, a miſtake in naming a perſon to be arreſted in a capias is fatal, and all thoſe concerned in making the arreſt are treſpaſſers. Shadgett *v.* Clipſon, 8 T. R. 328. Scandover *v.* Warne, 2 Campb. 270. And if there be a warrant againſt J. S., and B. the officer aſks A. his name, and A. anſwers J. S., whereupon B. arreſts him, A. may nevertheleſs maintain treſpaſs and falſe impriſonment againſt B.—Moor 457. Hard. 323.

GAHA-

1811.
Wedneſday, Dec. 4.

GAHAGAN *v.* COOPER.

THIS was an action on ſtat. 38 Geo. 3. c. 71. § 2., (*a*) for piracy a buſt of the late *Rt. Honourable C. J. Fox.*

It is no offence under 38 G. 3. c. 71. paſſed for preventing the pirating of buſts and other figures made and publiſhed by ſtatuaries, to *ſell* a pirated caſt of a buſt, if the piracy has any addition to or diminution from the original, and it appears to be no offence to *make* a pirated caſt, if it is a perfect fac ſimile of the original.

(*a*) And be it further enacted, that if any perſon ſhall within the ſaid term of fourteen years, make or cauſe to be made any copy or caſt of any ſuch new model, copy, or caſt, or any ſuch model, copy, or caſt in alto or baſſo relievo, or any ſuch work as aforeſaid, or any ſuch new caſt from nature as aforeſaid, either by adding to or diminiſhing from any ſuch new model, copy or caſt or adding to or diminiſhing from any ſuch new model, copy or caſt, in alto or baſſo relievo, or any ſuch work as aforeſaid, or adding to or diminiſhing from any ſuch new caſt from nature, or ſhall cauſe or procure the ſame to be done, or ſhall import any copy or caſt of ſuch new model, copy, or caſt, or copy or caſt of ſuch new model, copy or caſt in alto or baſſo relievo, or any ſuch work as aforeſaid, or any copy or caſt of any ſuch new caſt from nature as aforeſaid, for ſale, or ſhall ſell or otherwiſe diſpoſe of, or cauſe or procure to be ſold or expoſed to ſale, or otherwiſe diſpoſed of any copy or caſt of any ſuch new model, copy, or caſt, or any copy or caſt of ſuch new model, copy, or caſt in alto or baſſo relievo, or any ſuch work as aforeſaid, or any copy or caſt of any ſuch new caſt from nature as aforeſaid, without the expreſs conſent of the proprietor or proprietors thereof firſt had and obtained in writing, ſigned by him, her, or them reſpectively, with his, her, or their hand or hands, in the preſence of and atteſted by two or more credible witneſſes; then and in all or any of the caſes aforeſaid, every proprietor or proprietors of any ſuch original model, copy, or caſt, and every proprietor or proprietors of every ſuch original model, or copy

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The 4th count of the declaration, to which alone the evidence was applicable, ſtated, that the plaintiff after the paſſing of the ſaid act, in the ſaid firſt count mentioned, and alſo before the committing, &c., to wit, on the ſaid firſt day of September 1806, made and cauſed to be made a new model of a certain other buſt, that is to ſay, a buſt of the ſaid Right Honourable C. J. Fox, and which ſaid laſt mentioned model was firſt publiſhed by plaintiff, and plaintiff, before the ſame was publiſhed or expoſed to ſale, to wit, &c., did cauſe his name to be put thereon, with the date of the publication aforeſaid, by means, &c., he the plaintiff became and was, and from thence hitherto hath been, and ſtill is the proprietor of the ſaid laſt mentioned new model, and hath for and during all the time laſt aforeſaid had, and ſtill hath the ſole right, property in the ſame, to wit, &c. — nevertheleſs defendant well knowing, &c., and contriving to injure the plaintiff ſo having the ſole right and property in the ſaid laſt mentioned model, to wit, on the ſaid 20th day of October 1809, and on divers other days and times, &c., wrongfully and injuriouſly did expoſe to ſale, and cauſe to be expoſed to ſale divers, to wit,

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copy or caſt in alto or baſſo relievo, or any ſuch work as aforeſaid, or the proprietor or proprietors of any ſuch new caſt from nature as aforeſaid, reſpectively, ſhall and may, by and in a ſpecial action upon the caſe to be brought againſt the perſon or perſons ſo offending, receive ſuch damages as a Jury on the trial of ſuch action, or on the execution of a writ of enquiry thereon ſhall give or aſſeſs, together with full coſts of ſuit.

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1000 casts of the said last mentioned model, of the said bust so made by plaintiff as last aforesaid, and afterwards, to wit, on the said 20th day of October 1809, and on the said other days and times, &c., did wrongfully and injuriously sell and dispose, and cause and procure to be sold and disposed of part, to wit, 500 of the said last mentioned casts, without the express consent of the plaintiff so being the proprietor of the said model and cast so made by him as last aforesaid first had and obtained in writing signed by plaintiff with his hand in the presence of and attested by two or more credible witnesses, or otherwise; contrary to the form of the statute, &c., whereby, &c., the plaintiff hath been, was, and is greatly injured in his property in the said model and bust so made by him as last aforesaid, and hath lost and been deprived of divers great gains and profits which might and would otherwise have arisen and accrued to him therefrom.

The declaration contained various other counts; but they all alleged that the defendant *made* the pirated bust complained of.

It appeared that the plaintiff had made and published a bust of *Mr. Fox* in the manner above stated; and that a bust, the head of which exactly resembled that of the plaintiff's and had evidently been cast in a mould taken from it, was exposed to sale in the shop of the defendant; but that the pirated bust had drapery thrown over the breast, and the shoulders rounded off; whereas the original was quite naked, and its sides were planes. There was no evidence that

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the defendant, who is a carver and gilder, had made the buſt which he expoſed to ſale.

Topping for the defendant objected, that this could not be conſidered *a caſt* of the plaintiff's model, as the drapery and turn of the ſhoulders conſtituted a material difference between them. Could it have been proved that the defendant had *made* the buſt he expoſed to ſale, the caſe might have been brought within the act of parliament, by which the making any copy or caſt of a new model, "*either by adding to or diminiſhing from any ſuch new model*" is prohibited; but the act is ſo abſurdly framed that to *make* a perfect copy or caſt is no offence, and it is no offence *to expoſe to ſale or ſell* a copy or caſt of the model, if there be any addition to or diminution from it.

Garrow for the plaintiff inſiſted, that the pirated buſt might well be conſidered a *caſt* of the defendant's model, if they were ſubſtantially the ſame; and that the difference introduced by the drapery was merely colourable.

Lord ELLENBOROUGH.—The ſtatute ſeems to have been framed with a view to defeat its own object. But how can I ſay that one buſt is the caſt of another, though the head be the ſame in both, if by the addition of drapery and a diſſimilar management of the ſhoulders, the reſt of the figure is different? I think the defendant did not expoſe to ſale a caſt of the plaintiff's model; and unleſs you prove that he *made* the pirated caſt by adding the drapery, you ſupport no count of your declaration.

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Garrow contended, that the defendant might be presumed to have made the bust which he exposed to sale.

If a person who is not a modeller or statuary *exposes to sale* a pirated bust, this is not presumptive evidence of his having *made* it.

Lord ELLENBOROUGH. — Had he been a modeller or statuary by trade, there might have been some ground for that presumption, but it would be too much to presume a bust to have been made by a man of a different trade, because it is exposed to sale in his shop. These artists must again apply to parliament for protection; and they had better not model the new act themselves as they seem to have done the former. In the mean time, I am obliged to say, though with great reluctance, that the present plaintiff must be nonsuited.

Garrow and *Comyn* for the plaintiff.

Topping and *Gaselee* for the defendant.

[Attorbies, *Richardson* and *Newcom*.]

DOE, d. DIGBY, *v.* STEEL.

In ejectment by an executor, it is sufficient primâ facie evidence that the testator had a chattel interest in the premises, to put in the defendant's answer to a bill in equity stating that "*he believed the testator was possessed of the leasehold premises in the bill mentioned.*"

THIS was an ejectment brought upon the demise of Wriothesley Digby Esquire, as the executor of the last will and testament of the late Dame Elizabeth Mackworth, who was the executrix of the last will

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Doe, d. Digby, v. Steel.

and teſtament of her late huſband, Sir Herbert Mackworth, Baronet, deceaſed, to recover the poſſeſſion of a houſe in Henrietta Street, Mancheſter Square.

In ſupport of the title of the leſſor of the plaintiff, there was put in the defendant's anſwer to a bill in equity, filed againſt him for a diſcovery. In this he ſtates, "that he believes that Sir Herbert Mackworth was poſſeſſed of the *leaſehold* premiſes in the bill mentioned." —

Topping for the defendant objected, that in the declaration there was only one demiſe, namely, by Mr. Digby as executor of Lady Mackworth, who was executrix of her huſband, and that Mr. Digby was not proved, or even pretended to be, the Heir at Law of Sir Herbert Mackworth, or deviſee under any will of Sir Herbert's duly executed ſo as to paſs a real eſtate. They were therefore bound on the other ſide to go further, and ſhew that Sir Herbert's was a chattel intereſt and not a freehold.

Lord ELLENBOROUGH ſaid, that as againſt the defendant who had admitted that he believed Sir Herbert to have been in his lifetime *poſſeſſed* of the *leaſehold* premiſes in queſtion, he would not require the plaintiff to go further; that the term *poſſeſſed*, as contradiſtinguiſhed from the word *ſeized* was properly applied to chattel intereſts; and that although there were freehold leaſes, ſtill in common parlance the term *leaſehold* imported a chattel intereſt.

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The plaintiff then put in probates of the wills of Sir Herbert and Lady Mackworth, and alſo proved the ſervice upon the defendant, upon the 18th December 1810, of a notice of that date to quit the premiſes on 24th June following, "*provided the tenancy originally* "*commenced on the 25th day of December*, or otherwiſe "to quit at the end of the year of the tenancy which "ſhould expire next after the end of half a year from "the date thereof."

If after the expiration of a notice to quit, the landlord gives the tenant a freſh notice that unleſs he quit in 14 days he will be required to pay double value, the ſecond notice is no waiver of the firſt.

It was admitted that the tenancy commenced, not on the 25th of December, but on the 24th of June.

Lord ELLENBOROUGH having held that this notice was ſufficient, the defendant's counſel produced a ſecond notice from Mr. Digby to the defendant Steel, in Auguſt 1811, (after the time when the former notice had determined,) to quit the premiſes *which Steel then held under him* in fourteen days, otherwiſe he ſhould require double value.

Topping then contended that the firſt notice upon which the plaintiff was now proceeding, had been waived by the ſecond; that the demiſe in the ejectment being laid on the 27th June 1811, the defendant was by the ejectment conſidered as a treſpaſſer from that time, whereas the ſecond notice recognized a ſubſiſting tenancy in the month of Auguſt following, and that the characters of treſpaſſer and tenant at the ſame time were incompatible.

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Reader and *D. F. Jones*, contrà, insisted that the first notice was not waived by the second; that the second notice was *diverso intuitu;* that the intent was not to continue the tenancy which had been previously determined at Midsummer 1811, but merely to entitle the lessor of the plaintiff to recover double value for so long a time as the defendant might hold over, and that it must have been so understood by the defendant himself. They cited the cases of *Doe, d. Cherry*, v. *Batten*, Cowp. 243, and *Doe, d. Williams*, v. *Humphreys*, 2 East, 237.

Lord ELLENBOROUGH observed, that it certainly appeared to him that the second notice was not intended, and could not be understood to be intended as a waiver of the first, having for its object merely the recovery of double value. It was only a qualified condonation of the trespass. However His Lordship said, he would leave the question as to the *qua animo* to the Jury.

The jury immediately found for the plaintiff.

Reader and *D. F. Jones* for the plaintiff.

Topping and *Lawes* for the defendant.

[Attornies, *Woodcock* and *Griffin.*]

N. I was not in court during the whole of this trial; but I was furnished with the above note by one of the counsel in the cause.

PHILLIPS

1811.

Thurſday, Dec. 5.

PHILLIPS *v.* COCKAYNE.

If an uſurious ſecurity be given for a legal ſubſiſting debt, although the ſecurity is void, the debt is not extinguiſhed.

THIS was an action againſt the defendant as acceptor of a bill of exchange, dated 16th of April 1811, drawn by the plaintiff, payable to his own order at two months after date, for 28*l.* "value received in lead." The declaration likewiſe contained counts for goods ſold and delivered. Plea, the general iſſue.

It was proved that the defendant accepted the bill in queſtion; and that a ſhort time before, he had purchaſed from the plaintiff lead to the value of 28*l.*

The action was defended on the ſcore of uſury. It appeared that immediately upon the ſale of the lead, the defendant accepted a former bill for it to the ſame amount, at two months after date. When this bill became due, he was unable to take it up, and he applied to the plaintiff for a renewal. The plaintiff agreed to renew it, on receiving a premium of 1*l.* This was acceded to; the 1*l.* was paid; the bill now in ſuit was drawn and accepted, and the former one was delivered up to the defendant.

Garrow for the plaintiff inſiſted, that at all events he was entitled to recover for the *goods ſold*. If the ſecurity was deſtroyed, the original debt ſtill ſubſiſted.

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Comyn contrà, maintained, that by the ſtatute of uſury, 12 Ann. ſt. 2. c. 16., the debt and ſecurity were both avoided. The plaintiff by taking uſurious intereſt had ſubjected himſelf to a penalty of thrice the amount of the ſum forborne, and could not be allowed to recover that ſum in a court of juſtice.

Lord ELLENBOROUGH. — The ſtatute renders void all *bonds*, *contracts*, and *aſſurances* for payment of any principal whereupon there is reſerved above the rate of 5*l.* per cent. If there was once a valid ſubſiſting debt, that cannot be deſtroyed by a void ſecurity. The bill here is void by reaſon of the uſury; but the plaintiff is in the ſame ſituation as if no bill had ever been given, and may clearly recover the amount of his demand for goods ſold and delivered. His Lordſhip cited and relied upon *Robinſon v. Bland*, 2 *Burr.* 1081, upon the ſtatute of gaming, where it was held that money lent at play might be recovered, although the ſecurity for it was void.

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Comyn for the defendant.

[Attornies, *Railton* and *Richardſon*.]

Vide Gray v. Fowler, 1 H. Bl. 462. Barnes v. Headly, 2 Taunton, 184.

MARTINS,

1811.

Thurſday, Dec. 5.

MARTINS, q. t. *v.* GALLOWAY.

THIS was an action on 5 Eliz. c. 4. for ſetting to work a perſon who had not ſerved an apprenticeſhip of 7 years.—The trade was deſcribed in different counts of the declaration as that of a *turner*, a *ſmith*, a *white-ſmith*, and an *engineer-ſmith*.

A trade is not within 5 Eliz. c. 4, although ſeveral of its intermediate operations were known and practiſed in England when the act paſſed, if its ultimate object be a machine or manufacture ſubſequently introduced or invented.

In an action on 5 Eliz. c. 4. for ſetting to work in a trade a perſon who had not ſerved an apprenticeſhip, if the trade is not enumerated in the ſtatute, ſome evidence muſt be given that it was known and practiſed in England when the act paſſed.

It appeared that the defendant, a man of great ingenuity, carries on the buſineſs of what is called a *machiniſt*, or mechaniſt, making engines and inſtruments of various ſorts, compoſed of the different metals. In fabricating theſe, he uſes a lathe like a *turner*, a forge and anvil like a common *ſmith*, and ſeveral of the tools which are conſidered as belonging to the *white-ſmith*; but his engines and inſtruments could not be made by perſons of any one of thoſe trades. He employed the young man named in the declaration, (who had not ſerved any apprenticeſhip) in ſeveral parts of his buſineſs.

Park for the plaintiff inſiſted, that as the defendant had ſet an unqualified perſon to do particular ſorts of work done by *turners* and *ſmiths*, he had employed him in the trades of a *turner* and *ſmith*, both of which are enumerated in the act of parliament; and that though the defendant's buſineſs when conſidered in the aggregate, might neither be that of a *turner* or common *ſmith*, yet it was properly deſcribed in the declaration as that of an *engineer-ſmith*.

Lord

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Lord ELLENBOROUGH.—The trade of an *engineer-ſmith* is not mentioned in the ſtatute, nor do I believe that it exiſted in the reign of Queen Elizabeth. If it did, the plaintiff ſhould have proved this by books of that period or by ſome other evidence. Can the defendant then be conſidered either a *turner*, *ſmith* or *white-ſmith?* He cannot, unleſs you ſever his buſineſs into parts; whereas you muſt view it in the aggregate, not looking to intermediate operations, but the ultimate product of his labour. The buſineſs of a watchmaker has been introduced into England ſince the time of Elizabeth, and is clearly not within the ſtatute. But the watchmaker *turns* ſome of the works of the watch in a lathe, and makes others by operations very much reſembling thoſe of a *ſmith*. — By the trade of a *turner* in the ſtatute, I rather think is meant only the turning of wood and of ivory. If the turning of metals was at all known here in the reign of Elizabeth, it could not have been a ſeparate trade. — With theſe obſervations His Lordſhip left it to the jury to ſay, whether upon the evidence, the defendant had ſet the young man to work as a *turner*, *ſmith*, or *white-ſmith*.

Verdict for the defendant.

Park and *Lawes* for the plaintiff.

Garrow and *A. Moore* for the defendant.

[Attornies, *Chippendale* and *Edwards*.]

Vide Coward v. Maberley, 2 Campb. 112. Pratt v. Fraſer, *ante* 14.

KAY

1811.

Thurſday, Dec. 5.

KAY *v.* DUCHESSE DE PIENNE.

A woman by birth an alien, and the wife of an alien, cannot be ſued as a feme ſole, if her huſband has lived with her in this country, although he has left her here and entered into the ſervice of a foreign ſtate.

THIS was an action againſt the defendant as maker of a promiſſory note dated 10 July 1804, payable to the plaintiff 3 months after date.

The defence was, that ſhe was not liable to be ſued upon the note, *being a married woman.*

It appeared that the Ducheſſe is a French emigrant; that before the French revolution ſhe lived in France with the Duc de Pienne as his wife; that ſhe was ſo conſidered by the French nobleſſe, and received in that character at the court of Louis XVI.; that the Duc and Ducheſſe de Pienne came to England and lived ſome time together as man and wife; but that he left this country in 1803, to enter into the ſervice of Sweden, and has remained abroad ever ſince.

This was held to be preſumptive evidence of the coverture.

Garrow for the plaintiff inſiſted, however, that the Duc and Ducheſſe de Pienne being both aliens, from the time when he went abroad ſhe might lawfully contract, and was conſequently liable to be ſued as a *feme ſole.* She was in the ſame ſituation as if her huſband had abjured the realm. If a Britiſh ſubject leaves the country, he goes *animo revertendi*, his abſence is likely to be temporary, and he may at any moment

be

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be recalled by the King. But there is no reaſon to expect that an alien who has once left this kingdom will ever again come within reach of the proceſs of our courts of juſtice. Therefore, thoſe who have truſted his wife even for neceſſaries will have no means of recovering their debts, unleſs ſhe may be ſued as a *feme ſole*; and if ſhe could not, the conſequence would be that ſhe might be ſtarved. In two caſes in which this very lady was defendant (*Walford v. Ducheſs de Pienne* E. T. 1797, 2 *Eſp.* 554, and *Franks v. Ducheſs de Pienne*, M. T. 1797, 2 *Eſp.* 587.) Lord Kenyon held, that the wife of an alien may contract and be ſued as a feme ſole from the time her huſband leaves the kingdom; and under circumſtances exactly the ſame as the preſent the plaintiffs recovered.

Lord ELLENBOROUGH.—If the huſband has never been in this kingdom, the wife of an alien I think may be ſued as a feme ſole. That is the Ducheſs of Mazarine's Caſe. I don't know whether it was diſtinctly brought to LORD KENYON'S attention, that the Duc de Pienne had been living with the defendant as his wife within the realm. If ſo, I cannot ſubſcribe to his opinion. But at the time of thoſe deciſions *Ringſtead v. Lady Laneſborough*, and *Corbett v. Poelnitz* had not been judicially overturned. Since the caſe of *Marſhall v. Rutton* (*a*), which reſtored the old common law upon this ſubject, I conſider it quite clear that a married woman under the circumſtances of the preſent defen-

(*a*) E. T. 1800. 8 T. R. 545.

dant,

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dant, is not liable to be ſued as a *feme ſole*. Her huſband who had been living with her in England goes abroad in 1803. How ſoon he might have returned does not appear. The note is granted in July 1804, and becomes due the October following. Could ſhe *then* have been ſued upon it, when her huſband had been abſent only a twelvemonth, and might have been again living with her here before the cauſe was brought to trial? Does a woman who has once been in the ſituation of a *feme covert* in this country become a *feme ſole* becauſe her huſband has been abroad a year? The Duc de Pienne neither was nor is under any legal diſability to rejoin his wife in England. If it was preſumed in 1797 that he would never reviſit this country, it was a preſumption againſt the fact, for it appears by the evidence in this cauſe that he was living here in the year 1803. Where the huſband has abjured the realm, or is exiled, he cannot return, and the caſe ſtands upon perfectly different principles.

Plaintiff nonſuited.

In the enſuing term a motion was made to ſet aſide this nonſuit, but the Court fully concurring with the direction of the Chief Juſtice at niſi prius, refuſed a rule to ſhew cauſe.

Garrow and *Abbott* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies, *Bevill* and *Moore*.]

Vide Marſh v. Hutchinſon, 2 Beſ. & Pull. 226. Beggett v. Frier, 11 Eaſt, 301.

FAULDER

1811.

Monday, Dec. 9.

FAULDER Spr. *v.* SILK and Another, EXECUTORS of T. C. JERVOISE Esq. deceased.

Where to an action against executors on the bond of their testator, they plead *non est factum*, and set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against the testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence.

DEBT on bond dated 28th July 1808, in the penal sum of 10,000*l.* to secure the payment of an annuity of 500*l.* settled by the testator upon the plaintiff. Plea, *non est factum.*

This action was brought by the direction of the *Lord Chancellor*, for the purpose of trying whether the testator was in a state of insanity when he executed the bond. To shew that he was, the defendants offered in evidence (among other things) an inquisition taken under a commission of lunacy against the testator in his lifetime, by which it was found that he had been a lunatic from February 1808, without any lucid interval. This was objected to on the part of the plaintiff, as being *res inter alios acta.*

Lord ELLENBOROUGH, however, thought, that although the inquisition was by no means conclusive on the trial of the present issue, it was admissible evidence; and that it would be for the jury after comparing it with the other facts of the case, to determine what weight it was entitled to.—

The plaintiff had a verdict.

The *Attorney General*, *Garrow*, *Park*, and *Holroyd* for the plaintiff.

Jekyll, *Best*, and *Gurney* for the defendant.

Vide Yates *v.* Boen, Stra. 1104. Sergeson *v.* Sealy, 2 Atk. 412.

AD-

ADJOURNED SITTINGS IN LONDON.

1811.

Wednesday, Dec. 11.

WARWICK *v.* SLADE and Another.

The authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip till such time as they have actually subscribed the policy; and if the broker having procured a slip to be written on terms within the scope of his original authority, receives an intimation from his principals that they will not submit to these terms, and afterwards effects the policy and pays the premiums to the underwriters, he can maintain no action against his principals for commission or money paid.

INDEBITATUS assumpsit by an insurance broker, to recover the sum of 105*l.* paid by him for premiums on a policy effected for the defendants.

On the 17th November 1810, the defendants sent an order to the plaintiff, to insure 200*l.* on barley and flour on boardthe ship *Union*, from *Wells* in Norfolk, to *London*, stating that the ship had sailed on the 14th with a fair wind.

There had been an intermediate storm, and under an apprehension that the *Union* might have suffered in it, the plaintiff could not get the insurance done under 50 guineas per cent. On the 17th a slip was written by two underwriters for 100*l.* each at that premium, and between 6 and 7 the same evening the plaintiff called at the defendants' counting house, and left word that he had made the insurance at 50 guineas per cent. premium. The defendants were then from home; but in about an hour after, they sent the plaintiff a letter in the following words:

"Mr.

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"Mr. Warwick,

"We are much ſurpriſed to hear you have given 50 per cent. on the Union from Wells to London, when you had no ſuch authority from us. We therefore cannot ſubmit to it.

(Signed) "Slade and Pettitt."

The ſtamped policy was not written out or ſigned till two days after, — when being offered to the defendants, they refuſed to receive it.

Garrow for the plaintiff inſiſted, that however high the premium was, his client was bound to get the inſurance effected, and would have been liable to an action if he had not done ſo. The ſuppoſed countermand came too late, when he had entered into the agreement with the underwriters, and the ſlip had been ſigned. After that, he was bound in honour to pay the premium to the underwriters, and the policy when formally executed muſt have reference back to the ſigning of the ſlip.

Lord ELLENBOROUGH. — I cannot take notice of theſe honorary engagements. Till the ſtamped policy was ſigned by the underwriters, no binding contract was entered into, and the authority of the broker might be revoked. Therefore, ſuppoſing the original order would have empowered the plaintiff to give a premium of fifty guineas for a voyage from Wells to London, after the letter he received in the evening of the 17th, his authority was determined. The policy was not then effected. The revenue laws forbid me to

to look to what is called the *ſlip*. The plaintiff afterwards paid the premium in his own wrong, and there is no implied promiſe on the part of the defendants to reimburſe him.

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WARWICK v. SLADE and Another.

Plaintiff nonſuited.

Garrow and *Taddy* for the plaintiff.

Park and *Marryat* for the defendants.

[Attornies, *Croſs* and *Lee*.]

Vide Farmer v. Robinſon, 2 Campb. 339. *n*.

Wedneſday, Dec. 13.

COTHAY and OTHERS *v.* TUTE and Another.

Where a perſon in the country gives an order to a tradeſman in London with whom he has been in the habit of dealing, to ſend him down *more goods* by a particular coach, and at the office of this coach there is a notice ſtuck up, intimating that the proprietors will not be anſwerable for goods above the value of 5*l* unleſs inſured, it is enough for the vendor to deliver the goods ordered at this office, although they be above the value of 5*l*. without inſuring them, unleſs he has inſured for the purchaſer in former inſtances.

GOODS ſold and delivered.

The plaintiffs are dry-ſalters at *London*, the defendants dyers at *Leeds*. In December 1809, the defendants wrote a letter to the plaintiffs, deſiring them to ſend down 60lbs. *more of cochineal by the firſt coach*. The plaintiffs accordingly delivered this quantity of cochineal at the *Bull and Mouth* inn, to be carried to the defendants by a coach that runs from thence to *Leeds*. At the coach office there was a notice ſtuck up, ſaying that the proprietors would

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COTHAY and Others v. TUTE and Another.

not be anſwerable for any package above the value of 5*l.*, unleſs entered as ſuch and paid for accordingly. This cochineal was not ſo entered, although worth about 150*l.*, and it was loſt on the way to *Leeds*. There was no evidence of the manner in which the former cochineal had been ſent.

Garrow for the defendants inſiſted, that they were not liable, as the plaintiffs had not given them a remedy over againſt the carrier. The plaintiffs muſt be taken to have been aware of the notice, as well as of the law upon this ſubject. It was therefore their duty to have entered the cochineal as above the value of 5*l.* Without this, there was no ſufficient delivery to the carrier to charge the defendants, and as they had derived no benefit, ſo they were not liable to make any compenſation.

Lord ELLENBOROUGH.—The point made does not properly ariſe in this cauſe. The defendants order 60lbs. *more* of cochineal to be ſent them. It was therefore incumbent upon them to ſhew how the former parcel was ſent, and whether it was entered and inſured as above the value of 5*l.* — Upon the general queſtion I am not now called upon to give any deciſive opinion; but as it is in practice ſo unuſual under theſe notices to enter and inſure goods as above the limited value, I ſhall be inclined to hold that the vendor is not bound to do ſo, without expreſs inſtructions for that purpoſe. Were he to inſure of his own accord with the carrier, how far would the purchaſer be liable for the heavy additional expence thus incurred?

curred?—In this caſe the plaintiffs are clearly intitled to a verdict for the value of the goods.

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COTHAY and Others. v. TUTS and Another.

Park and *Campbell* for the plaintiffs.

Garrow and *Copley* for the defendants.

[Attornies, *Oldham* and *Lambert*.]

PRICKETT, and CARRUTHERS and Others, Aſſignees of HALLIDAY, a Bankrupt, *v.* DOWN and Others.

Wedneſday, Dec. 11.

THIS was an action againſt Meſſrs. Down and Co. the bankers, to recover a balance of 6,651*l.* 3*s.* 10*d.* in their hands, due to the plaintiff *Prickett*, and the aſſignees of *Halliday*.

Where two partners have ſtopped payment, and a commiſſion of bankrupt is taken out againſt one of them, a debtor to the firm who knows of the ſtoppage cannot refuſe to pay money due to them, on the ground that the other may have committed an act of bankruptcy, in which caſe his aſſignees might call upon the debtor to pay a moiety of the money a ſecond time.

Prickett and *Halliday* were in partnerſhip as inſurance-brokers. In November 1810, they ſtopped payment. On the 13th of July 1811, the partnerſhip was diſſolved, and on the 16th of the ſame month a commiſſion of bankrupt iſſued againſt *Halliday*. The defendants were adviſed that they could not legally pay over the balance in their hands, as they had notice of *Prickett* having ſtopped payment, and if a commiſſion of bankrupt ſhould afterwards be iſſued againſt him upon an act of bankruptcy prior to the payment, they might again be called upon, to account for the money by his aſſignees.

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PRICKETT and Others v. DOWN and Others.

Park, for the defendants, pointed out the ſituation in which they ſtood, and ſhewed that they were not protected by Sir Samuel Romilly's act (*a*), which contains a proviſo that perſons paying money to the bankrupt ſhould have no notice of his having become inſolvent, or ſtopped payment.

Lord ELLENBOROUGH.—The defendants are not under the protection of that act; but before it was paſſed, they could not have juſtified refuſing to pay the balance in their hands under ſimilar circumſtances, to whatever ſubſequent inconvenience the payment might have expoſed them. Till the party has actually become a bankrupt, and a commiſſion has been taken out againſt him, he may ſue his debtors. There may be peril in paying a man who is known to have ſtopped payment; but that affords no defence to an action for a debt juſtly due to him.

Verdict for the plaintiffs.

Garrow and *Gaſelee* for the plaintiffs.

Park for the defendant.

[Attornies, *Gregſon & Co* and *Dawes*.]

Vide Foſter *v.* Allanſon, 2 T. R. 479.

(*a*) 46 G. III. c. 135. § 1.

1811.

Wednesday, Dec. 11.

BOYD *v.* DUBOIS.

If a fire arises on board a ship from the damaged quality of goods on board which are insured, the underwriters are not liable; but if the loss is not occasioned by the damaged state of the goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though that might have a tendency to encrease the risk.

THIS was an action on a policy of insurance on hemp, on board the ship *Joseph and Betsey*, from London to the coast of Devonshire. The loss was laid *by fire.*

The plaintiff's witnesses stated, that while the ship was lying at a place near Torbay, a fire broke out in the hold during the night, which consumed the greatest part of the cargo, but the origin of which could not be discovered.

The defendant's counsel undertook to prove, that the hemp was damaged; that for this reason it was apt to ferment and take fire; that its condition had not been communicated to the underwriters, and that the fire actually had originated in the hemp itself. And they contended, that even if the last circumstance should not be satisfactorily made out, the underwriters would be discharged by the damaged state of the hemp not being communicated to them, since, had they been aware of that, they would have refused to subscribe the policy.

LORD ELLENBOROUGH. — If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot

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not recover for a loſs which he himſelf has occaſioned. But I moſt poſitively ſay, that they were not bound to repreſent to the underwriters the ſtate of the goods. It would introduce endleſs confuſion and perpetual controverſies, if ſuch a duty were to be impoſed upon the aſſured.

There was no proof that the fire had originated from the damaged ſtate of the hemp, and the plaintiff had a verdict.

Park and *Lawes* for the plaintiff.

Topping and *Carr* for the defendant.

[Attornies, *Jackſon* and *Gibbs*.]

Thurſday, Dec. 12.

DOE d. PITT v. SHEWIN.

A covenant in the leaſe of a houſe, "to inſure and keep inſured a given ſum of money upon the premiſes during the term in ſome ſufficient Inſurance Office," is not void for uncertainty; but means, that the premiſes ſhall be inſured againſt fire in ſome office where inſurances againſt fire are uſually effected.

EJECTMENT on the forfeiture of a leaſe, to recover poſſeſſion of a houſe called *Grigſby's Coffee-houſe* in *Threadneedle Street*. The demiſe was laid on the 25th day of April 1811.

Where there was ſuch covenant in a leaſe on the part of the tenant, he effected an annual policy on the premiſes with an Inſurance Company in the uſual printed form, by which it is declared that the policy ſhall be for ſuch longer period as the tenant ſhall regularly pay, and the Company receive the premium, and a ſpace of 15 days beyond the quarter days is given for payment of the premium, during which time the Company is liable: The year expired on the 25th of March 1811; but the tenant did not pay the premium for a renewal till the 25th of April following: The Company then gave a receipt for the premium, ſtating the inſurance to be from Lady-day 1811 to Lady-day 1812.—*Held*, that the covenant was broken by reaſon of the nonpayment of the premium on or before the 9th of April, and that the leaſe was forfeited upon a clauſe of re-entry.

In

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In May 1811, the leſſor of the plaintiff granted the defendant a leaſe of the premiſes in queſtion for 21 years wanting 10 days from Michaelmas 1800, at the rent of 84*l.* per annum. This leaſe contained the following covenant, for a breach of which the ejectment was brought:

"And further that ſhe the ſaid *Elizabeth Shewin*, "her executors, adminiſtrators and aſſigns, ſhall and "will from time to time, and at all times, during the "continuance of the term hereby granted, inſure and "keep inſured, or cauſe and procure to be kept in- "ſured, the ſum of 800*l.* at the leaſt in ſome ſufficient "inſurance-office within the cities of London and "Weſtminſter upon the ſaid meſſuage or tenement "and premiſes hereby demiſed and every part there- "of." — A clauſe of re-entry was added in the uſual form.

The defendant immediately inſured the premiſes at the *Phœnix Fire-office*, by a policy for a certain number of years, which expired in March 1810. A new annual policy was then effected with the ſame Company, by which the premiſes were inſured for 800*l.* to the 25th of March 1811. This policy was declared to be for ſuch longer period as the defendant ſhould regularly pay, and the Company ſhould receive the premiums. By printed conditions referred to in the policy, a ſpace of 15 days beyond the quarter-days, was given for payment of the premium, during which time the Company were to be liable. The defendant in fact did not pay the premium for a renewal of this policy

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on the 25th of March 1811, or within 15 days thereafter: but on the 25th of April following, she went to the Phœnix Office, paid the premium, and obtained a receipt in the following form;

"Prem. 0 16
"Duty 1 0
£1 16

"Received the 25th day of April 1811, of Mrs. E. Shewin, the sum stated in the margin hereof for one year's premium on 800*l.* insured in this office from Lady-day to 1811 to Lady-day 1812. Received at the same time the sum stated in the margin, for duty on the said policy for the same period.

"R. MILES."

No accident had happened by fire to the premises in the mean time. A clerk from the *Phœnix Office* stated that it is very common for the annual premium not to be paid till after the expiration of the 15 days; that it is always received when offered, and that a receipt is given for it in the above form.

Marryat, for the defendant, first objected that the covenant to insure was void for uncertainty, as it did not at all specify what the nature of the insurance was to be. The words are "*to insure and keep insured the sum of* 800*l. in some sufficient office, within the cities of London and Westminster upon the said messuage and premises.*" This did not shew against what the insurance was to be made, or in what sort of *office* it was to be effected.

Lord

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Lord Ellenborough.—I think by a reaſonable intendment the inſurance was to be againſt fire, and the leſſee was bound to inſure and keep inſured the ſum of 800*l.* upon the premiſes in an office where policies againſt fire are uſually effected.

Marryat then contended, that the covenant had been ſubſtantially performed. After the premium had been paid on the 25th of April, the policy muſt be conſidered as having been in force from the preceding quarter-day. The annual policy was effected for a year, and ſuch longer time as the premium was paid and received. The office, by receiving the premium, therefore, gave the policy an uninterrupted validity. The landlord had ſuffered no inconvenience by the premium not having been paid at the day, and if a fire ſhould now happen, he had the ſecurity of the policy. Where a forfeiture is to be incurred, covenants are always conſtrued with great ſtrictneſs, and it may well be ſaid that 800*l.* had been kept inſured upon the premiſes ſince the granting of the leaſe.

Lord Ellenborough.—There was an interval during which the inſurance was diſcontinued. The 15 days, which are an excreſcence from the preceding year, expired on the 9th of April. The policy then became extinct, and the landlord was deprived of all protection till the 25th of that month. A fire might have happened in the mean time, and there is no pretence for ſaying that in that caſe the *Phœnix Office* would have been liable. For a certain period the landlord ran the riſk of fire, and the ſum of 800*l.* was

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was not kept insured upon the premises in any office. It may admit of considerable doubt, whether by the revenue laws the policy could be lawfully renewed by the payment of the premium, after the expiration of the 15 days. At any rate, its existence was suspended from the 9th to the 25th of April. The covenant to insure was therefore broken, and the landlord is entitled to recover at law, whatever relief there may be for the tenant in equity (*a*).

Verdict accordingly.

Garrow and *Clarke* Jun. for the lessor of the plaintiff.

Marryat for the defendant.

[Attornies, *Shepherd* and *Allen*.]

(*a*) In this case the court of Exchequer had granted an injunction on payment of the costs of the action: but these were not paid as they ought to have been, and the defendant became bankrupt. The application for an injunction was then renewed on behalf of the assignees, but refused.

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Thurſday, Dec. 12.

BIETEN *v.* BURRIDGE and Others.

CASE for maliciouſly ſuing out bailable proceſs againſt the plaintiff, and cauſing him to be arreſted thereupon, and impriſoned and detained in cuſtody.

A. by miſtake ſues out a bailable writ againſt B, and gives it to C. an officer to be executed. —C. ſays to B. he has a writ againſt him, but B. denying that he owed the money, C. does not take him into actual cuſtody. On inquiry, the miſtake is diſcovered, and B. is told he need give himſelf no farther trouble in the matter. However, he afterwards puts in bail above, and incurs an expence of 1*l*. — *Held*, that he could not maintain an action againſt A. for a malicious arreſt.

The defendants, who are bankers at *Plymouth*, ſuppoſing by miſtake that the defendant was party to a diſhonoured bill of exchange in their hands, ſued out proceſs againſt him into the city of London. The bailiff's follower, to whom the writ was delivered, went to the plaintiff, and aſked him for payment of the bill of exchange. The plaintiff expreſſed great aſtoniſhment, and declared he had never ſeen or heard of the bill before. The bailiff's follower then ſaid, he had a writ againſt him, but he ſuppoſed there was ſome miſtake, and as he knew him to be a reſpectable man, he would go to the attorney and inquire into the matter. The miſtake being then diſcovered, it was explained to the plaintiff, and he was told he need give himſelf no further trouble. No bail-bond was executed or caption fee taken. The plaintiff, however, ſome time after inſiſted upon paying the bailiff a pound-note, and put in bail above, thus incurring an expence of 1*l*.

Garrow for the plaintiff contended, that the defendants by their own confeſſion had ſued out the proceſs without any reaſonable or probable cauſe; that the law inferred malice from ſuch an act, and that no advantage could be taken of the circumſtance of the officer having refrained to take the plaintiff into actual cuſtody. — But

Lord

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BISTEN v. BURRIDGE and Others.

Lord ELLENBOROUGH was clearly of opinion, that the action could not be maintained, as no arreſt or impriſonment had been proved; there was no evidence of malice; and the plaintiff had ſuffered no inconvenience, except what he had voluntarily brought upon himſelf.

Plaintiff nonſuited.

Garrow and *Eſpinaſſe* for the plaintiff.

Park for the defendant.

[Attornies, *Sherwin* and *Tilſon.*]

Vide Arrowſmith v. Le Meſurier, 2 N. R. 211.

Thurſday, Dec. 12.

SQUIRES v. WHISKEN.

No action can be maintained upon a wager on a cock-fight.

MONEY had and received. *Non aſſumpſit* except as to 2*l.* 2*s.* and as to that *a tender*, which was denied by the replication.

Scarlett in opening the plaintiff's caſe ſtated, that the action was brought to recover the ſum of four guineas. The plaintiff and one *Fordham* laid a wager of two guineas, that each on a given day ſhould produce a game cock, of a given weight, for the purpoſe of fighting; and that if either failed to produce ſuch cock on ſuch day, the other was to be conſidered the winner. They accordingly paid two guineas a-piece into the hands of the defendant as a ſtake-holder. On

the appointed day, the plaintiff produced a game cock, of the requiſite qualifications; but *Fordham* made default.

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SQUIRES v. WHISKEN.

Lord ELLENBOROUGH.—Is not cock-fighting an illegal ſport?

Scarlett ſaid, he had not been able to find any ſtatute by which it is prohibited; and ſuppoſing it to come within the general deſcription of *gaming*, ſtill as the ſum wagered was under 10*l.*, the action might be maintained.

Lord ELLENBOROUGH.—Cock-fighting muſt be conſidered a barbarous diverſion, which ought not to be encouraged or ſanctioned in a court of juſtice. I believe that cruelty to theſe animals, in throwing at them, forms part of the dehortatory charge of judges to grand juries, and it makes little difference whether they are lacerated by ſticks and ſtones, or by the bills of each other.—There is likewiſe another principle, on which, I think, an action on ſuch wagers cannot be maintained. They tend to the degradation of courts of juſtice. It is impoſſible to be engaged in ludicrous inquiries of this ſort conſiſtently with that dignity which it is eſſential to the public welfare that a court of juſtice ſhould always preſerve. I therefore will not try the plaintiff's right to recover the four guineas, and the evidence muſt be confined to the iſſue joined upon the tender.

The defendant was not able to prove a legal tender, and the plaintiff had a verdict with nominal damages.

Scarlett

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SQUIRES v. WHISKER.

Scarlett for the plaintiff.

Andrews for the defendant.

[Attornies, *Birkitt* and *Rooke*.]

Vide M'Allester v. Haden, 2 Campb. 438. Hussey v. Crickitt, *post*, 168.

Friday, Dec. 13.

CARRUTHERS *v.* GRAY.

To support an averment in a declaration on a policy of insurance on goods "that the ship with the goods on board when at A. was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained and confiscated," it is enough to shew that the goods were forcibly taken from on board the ship by the officers of government, and never delivered to the consignees;—without putting in any sentence of condemnation.

There is not an implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. Therefore, where from an omission of the captain, the goods insured on a voyage from this country to a foreign port are not mentioned in the ship's manifest as required by 13 & 14 Car. 2. c. 11. and other statutes, but the loss is not occasioned by this defect;—the underwriters are liable.

THIS was an action on a policy of insurance on goods by the *Antoinette Elizabeth* from London to Petersburgh.

The declaration averred that the ship, with the goods on board, when at *Cronstadt*, was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained and confiscated.

It appeared that on the ship's arrival at *Cronstadt*, her hatches were sealed down, and her cargo was afterwards forcibly unloaded by the officers of government, and never delivered to the consignees.

Scarlett for the defendant contended, that to support the averment as to the loſs, it was neceſſary to prove that the goods had been confiſcated, and to put in a ſentence of condemnation.

Lord ELLENBOROUGH.—Literally to ſhew *confiſcation*, it would be neceſſary to prove, that the proceeds of the goods came to the *treaſury* of the ſtate; but I think the averment is ſufficiently ſuſtained by proof, that the goods were forcibly taken poſſeſſion of by the officers of government.

The defence was, that the goods had not been regularly entered in the ſhip's manifeſt for exportation. Stat. 13 & 14 Car. 2. c. 11. § 2., and 8 G. 1. c. 16. require, under penalties and forfeitures, that the captain of every ſhip before ſailing ſhall deliver in at the cuſtom-houſe a paper called a Manifeſt, containing a ſtatement of all the contents of his cargo: and it was proved that the only Manifeſt delivered by the captain of this ſhip before ſailing on the voyage in queſtion, entirely omitted to mention the 16 bales of merchandize on which the preſent inſurance was effected.

It appeared however, that they had been regularly paſſed at the cuſtom-houſe by the ſhipper; that the cockets were duly made out and filed; that the goods, which might be lawfully exported without paying any duty, were put on board the ſhip in the common courſe of buſineſs at noonday; and that the omiſſion in the Manifeſt was ſolely imputable to the negligence of the captain.

Lord

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Lord ELLENBOROUGH held, that this omiſſion did not render the voyage illegal, ſo as to vitiate the policy, and that as it had not occaſioned the loſs, the underwriters were liable.

Verdict accordingly.

Park and *Marryat* for the plaintiff.

Scarlett and *Adam* for the defendant.

[Attornies, *Crowder & Co.* and *Palmer & Co.*]

Vide Bell v. Carſtairs, 14 Eaſt, 374.

Saturday, Dec. 14.

BARKER v. MACRAE.

A carrier employed by A. firſt to carry a ſum of money to B. and then the like ſum to C., in an action by A. againſt C. is a good witneſs from neceſſity to prove that by miſtake he delivered the firſt ſum to C. as well as the ſecond.

MONEY had and received, to recover the ſum of 19*l.* 10*s.* 8*d.*

The plaintiff was a ſhop-keeper at Wanſted, and accuſtomed to be ſupplied with goods, ſometimes by the defendant, and ſometimes by one *Copley*, tradeſmen in London. In October laſt, being indebted to *Copley* in 19*l.* 10*s.* 8*d.*, he employed one *Aſh*, the *Wanſted* carrier, to pay this debt. *Aſh* inſtead of delivering the money to *Copley*, delivered it by miſtake to the defendant, to whom the plaintiff owed nearly the ſame ſum. The defendant afterwards ſent in his bill, which was paid a ſecond time, through the agency of *Aſh*.

To

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BAKER v. MACRAE.

To prove this case, *Ash* was called as a witness on the part of the plaintiff.

Garrow for the defendant insisted, that he was interested, and could not be examined without a release. He was *primâ facie* liable himself, and he must repay the money to the plaintiff, unless, by his evidence, he could fix the defendant.

Lord ELLENBOROUGH.—I think he is a witness of necessity, and may be examined without a release.

The plaintiff had a verdict.

Park and *Scarlett* for the plaintiff.

Garrow for the defendant.

[Attornies, *Smith* and *Allifton*.]

HAMMOND and Others *v.* DUFRENE.

Monday, Dec. 16.

THIS was an action on a bill of exchange for 301*l.* 17*s.* 10*d.* dated 25th April 1811, drawn by the defendant upon and accepted by Messrs. Dufrene & Penny, payable at three months after date.

The drawer of a bill of exchange is entitled to due notice of its dishonour if he had any effects in the hands of the drawee at any time between the drawing of the bill and its becoming due.

To excuse the proof of notice to the defendant of the dishonour of the bill, one of the acceptors was

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called, who stated, that when the bill was drawn and accepted they had no effects of the drawer in their hands; but that before the bill became due, he paid a sum of 400*l.* on their account.

Park for the plaintiff insisted, that this was an accommodation bill, and that the drawer therefore was not entitled to notice of its dishonour.

Lord ELLENBOROUGH.—I think the drawer has a right to notice of the dishonour of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. In that case, he may reasonably expect that the bill will be regularly paid, and he may be prejudiced by receiving no notice that it is dishonoured. I am aware that the inquiry has generally been as to the state of accounts between the drawer and drawee when the bill was drawn or accepted; but I conceive the whole period must be looked to from the drawing of the bill till it becomes due, and that notice is requisite if the drawer has effects in the hands of the drawee at any time during that interval. Therefore if the defendant in this case paid a sum of money for Messrs. Dufrene & Penny before the 28th July, you must prove that he had due notice it was not paid on that day by the acceptors.

The case was afterwards brought before the Court, but the direction of the Judge at nisi prius upon this point was not questioned.

Park

Park and *Abbot* for the plaintiff.

Beard for the defendant.

[Attornies, *Swain & Co.* and *Blakelock.*]

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HAMMOND and Others v. DUFRENE.

Vide Legge v. Thorpe, 2 Campb. 310. Thackray v. Blackett, *post*, 164.

BARFOOT and Others, Executors of JOHN WILKES, v. GOODALL, DICKENSON the Elder, DICKENSON the Younger, and FISHER.

Thurſday, Dec. 19.

MONEY had and received.

A change of partners in a banking-houſe is ſufficiently notified to the cuſtomers of the houſe, by a change in the printed cheques.

Goodall and the two *Dickenſons* pleaded their bankruptcy, which was not diſputed; *Fiſher*, the general iſſue of *non aſſumpſit;* and the only queſtion was, whether he was liable as a partner with the others?

The defendants were formerly bankers, with whom Mr. *Wilkes*, the teſtator, kept caſh for a conſiderable number of years. *Fiſher* was a partner in the banking-houſe at the time *Wilkes*'s account was opened. *Fiſher*'s name appeared at the beginning of the caſh-book in which *Wilkes*'s account was kept, and no alteration of firm was mentioned in it. In point of fact, *Fiſher* ceaſed to be a partner in 1799. No advertiſement

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mentioning the circumstance was published in the Gazette, nor was any circular notice sent round to the customers of the house. In 1805 the partnership became bankrupt with a balance in their hands belonging to the testator of about 2000*l.*

Park for the plaintiffs contended, that *Fisher* continued liable as a partner, and he relied upon *Gorham* v. *Thompson*, Peak. Cas. 42, where it was decided, that when partners dissolve their partnership it is incumbent on them to publish notice of such dissolution in the Gazette, or they will be liable to creditors; and *Graham* v. *Hope*, Peak. Cas. 154. in which Lord KENYON held that even notice in the Gazette is not sufficient to affect a creditor, without evidence that he had read it.

It appeared, however, that when *Fisher* retired, the printed cheques were changed from "*Dickenson, Goodall & Fisher*," to "*Dickenson, Goodall & Co*;" and that afterwards when *Dickenson* the younger, became a partner, the printed cheques were again changed to "*Dickenson, Goodall and Dickenson.*" A great number of cheques in all these forms were produced, and proved to have been filled up and signed by the testator.

It was still maintained on the part of the plaintiff, that *Fisher* was liable, as he had given no express notice of his withdrawing from the partnership, as the attention of a customer might not be drawn to the form of the printed cheque, and there might for

for various reaſons be a change in the firm, while the partners themſelves remained unchanged.

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Lord ELLENBOROUGH. — I think the change in the partnerſhip was ſufficiently notified by the change in the cheque. It is the habit of banking-houſes to intimate in this manner that a partner has been introduced or has retired. When the teſtator had been accuſtomed to draw upon cheques furniſhed him with the name of *Fiſher*, and others were ſent him with the name of *Fiſher* omitted, before uſing theſe it became him to inquire what change had really taken place; and when he did continue to uſe them, I muſt preſume that he was perfectly well aware *Fiſher* had retired, and that he continued to deal with the houſe upon the credit of the other partners. A circular letter to the cuſtomers might be more regular; but I think a change of cheque is ſufficient notice of the diſſolution of partnerſhip to thoſe who have drawn cheques addreſſed to the new firm.

Plaintiff nonſuited.

Park, *Richardſon*, and *Fitzgerald* for the plaintiff.

The *Attorney General*, *Garrow*, and *Gurney* for the defendant.

[Attornies, *Bicknell* and *Andrews*.]

Vide Newſome v. Coles, 2 Campb. 617.

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Saturday, Dec. 21.

HARMAN and Others *v.* KINGSTON.

Where there is a policy on goods as may be thereafter declared and valued, the declaration of intereſt, to be available, muſt be communicated to the underwriters, or ſome one on their behalf, before intelligence is received of the loſs: But the declaration of intereſt is not a condition precedent; and if none is made, the policy is then open inſtead of being valued, and upon proof of intereſt at the trial, the aſſured will be entitled to recover.

THIS was an action on a policy of inſurance dated 1ſt Auguſt 1810, on goods by the ſhip *Maria*, "at and from Gottenburgh to port or ports of diſcharge in the Baltic." By a memorandum at the foot of the policy, the inſurance was declared to be "on ſugar and cotton *as might be thereafter declared and valued.*"

The declaration alleged that the goods were duly declared and valued before the loſs.

A clerk of the plaintiffs ſtated that on the 2d of October 1810, he wrote out and ſigned, by order of the aſſured, a ſpecification of intereſt with a valuation of the goods inſured on a ſeparate piece of paper, which he wafered to the policy; but he could not ſwear that he had ſhewn it to any of the underwriters or to any other perſon, till after intelligence of the loſs had been received.

The *Attorney General* objected, that this private memorandum of the clerk, which he had kept a ſecret from all the world, could not be conſidered a declaration of intereſt within the meaning of the policy. The object was to inform the underwriters before a loſs happened of the particular goods inſured, and of the value put upon them, that they might be protected from

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from any ſiniſter practices on the part of the aſſured. But if this declaration were ſufficient, it would be unneceſſary to communicate any declaration till the day of trial, or there might be twenty declarations privately written and ſigned before the loſs, and that one afterwards produced which according to the event would beſt ſuit the purpoſe of the parties.

Garrow and *Boſanquet*, *contrà*, maintained that it was merely a queſtion as to the credit of the witneſs. If he was believed, there had been a declaration made on the 2d of October, and the loſs did not happen till the 18th of November. The declaration of intereſt did not require the aſſent of the underwriters; this policy did not ſtipulate, as is ſometimes done, that it ſhould be authenticated by their initials; had it been ſhewn to them on the 2d of October, they could not have objected to it; and therefore if the witneſs ſpoke true, they were preciſely in as good a ſituation as if on that day it had been ſhewn to every one of them. *Henchman v. Offley*, 2 Hen. Bl. 345 *in notis*, was cited as in point.

Lord ELLENBOROUGH. — A declaration neceſſarily imports two parties, the perſon who makes it, and the perſon to whom it is made. How can I conſider an uncommunicated inſtrument a declaration? Had it been communicated to any perſon, or if it had been written on the policy, ſo that the party could not recede, perhaps that would have been ſufficient. I allow that a declaration of intereſt is no contract, and does not require the aſſent of the underwriters; but it muſt

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be communicated in such a manner that the assured cannot recede from it. Here there would have been no evidence that this instrument ever existed if it had suited the assured to destroy it, or to substitute another in its place.

Garrow then proposed to prove the loading of the goods, and their value, as in the common case of an open policy.

Lord ELLENBOROUGH at first entertained some doubts whether this could be done, and whether upon a policy of this sort the declaration of interest is not a condition precedent, which must be fulfilled by the assured before the liability of the underwriters attaches: but after further consideration, His Lordship said, I have now fully made up my mind, that where there is an insurance on goods as may be thereafter declared and valued, this gives the assured a power by duly declaring and valuing before the loss to make it a valued policy; but that if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial.

The *Attorney General*.—My lord, I feel myself bound entirely to subscribe to that doctrine; and had I been aware that the plaintiffs could prove the interest, I should not have made any objection.

The plaintiffs' case being made out, the defence set

In an action on a policy of insurance it is no defence under the general issue, that the persons interested who were neutrals when the policy was effected and the loss happened, had become alien enemies before action brought.

up

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up was, that the perſons intereſted (ſix in number) are now reſident at *Bremen*, which is annexed to France, and are therefore alien enemies, ſo as to be incapable of taking advantage of a licence granted to them when they ſtood to this country in the relation of neutrality.

To prove that a perſon was an alien enemy at the time of action brought, it is not enough to ſhew that he was ſome time before domiciled in a territory which has become hoſtile, without ſhewing that he was a native of that territory.

It was proved that they were all living at Bremen in the latter end of the year 1810, and the *Attorney General* contended, that till the contrary was ſhewn it muſt be preſumed they had lived there ever ſince.

Lord ELLENBOROUGH.—I think this is no defence upon the general iſſue. The fact of the perſons intereſted having become alien enemies ſince the loſs, only goes to ſuſpend the remedy, and ought to have been pleaded in abatement.—Beſides, you have given no evidence where theſe perſons were born, nor proved that they were living in a hoſtile territory at the time of action brought. You have not ſhewn them to be enemies either by birth or by domicile. How do I certainly know that they were not all Britiſh ſubjects who left Bremen as ſoon as they could after that place was uſurped by the French, and are now carrying on trade within the realm of England? A defence of this ſort which goes merely in diſability of the perſon is to be made out by the ſtricteſt proof.

Verdict for the plaintiffs.

A new trial was afterwards moved for on the ground that the perſons intereſted were become alien enemies.

A rule

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A rule to shew cause was granted, but afterwards discharged, the whole Court being clearly of opinion that this not being a perpetual bar to the action, it was no defence upon the general issue.

Garrow and *Bosanquet* for the plaintiffs.

The *Attorney General*, *Carr*, and *Richardson* for the defendant.

[Attornies, *Smith* and *Gregg* & *Corfield*.]

Monday, Dec. 23.

BAGLEHOLE *v.* WALTERS.

If a ship is sold *with all faults*, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser.

THE first count of the declaration stated, that the plaintiff on &c., at &c., bargained with the defendant to buy of him a certain ship, which the defendant then and there knew not to be a good, sound vessel fit for sea, but on the contrary thereof to be unsound, and to have 26 of her floor timbers broken; nevertheless the defendant by falsely and fraudulently *warranting* the said ship to be a good sound vessel fit for sea, afterwards &c., falsely and fraudulently sold two-third parts of the said ship to the plaintiff. — The 2d and 3d counts stated the warranty to be, that the ship was *in excellent condition*, and that she was *sea-worthy*. The 4th averred, that the defendant knew the ship was not sea-worthy, but on the contrary thereof had 26 of her floor timbers broken, nevertheless by falsely and

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and fraudulently *concealing* from the plaintiff that the ſhip was not ſea-worthy &c., falſely and fraudulently ſold two-thirds of her to the plaintiff. The 5th count was for falſely and fraudulently *repreſenting* to the plaintiff, and inducing him to believe that the ſhip was ſea-worthy; and the laſt count for falſely and fraudulently repreſenting to the plaintiff, and inducing him to believe that ſhe was in *excellent condition*, — both laying a *ſcienter*.

Plea, the general iſſue.

The defendant in May laſt being about to ſell the veſſel in queſtion, printed the following particulars of ſale, a copy of which was delivered to the plaintiff.

"For Sale.

"The Good Brig Iris.

"Burthen per regiſter 208 tons: will carry 17 keels "of coal and glaſs, or 300 loads of timber: has lately "delivered a cargo of ſugar from the Weſt Indies *in* "*excellent condition*: is well found in all kind of ſtores "which are in good condition. Hull, maſts, yards, "ſtanding and running rigging, *with all faults* as "they now lie."

The plaintiff then purchaſed two-thirds of the ſhip, which were conveyed to him by the defendant in the common form.

The *Attorney General* undertook to prove, that at the time of the ſale the ſhip had ſeveral ſecret defects in her; that theſe were known to the defendant, and that he did not diſcloſe them to the plaintiff. He maintained that the defendant was bound to do ſo, although

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although the ſhip was to be taken *with all faults*; and he relied upon *Melliſh v. Motteux*, Peak. Caſ. 115, where Lord KENYON, under circumſtances preciſely like the preſent, held, that the ſeller of a ſhip is bound to diſcloſe to the buyer all latent defects known to him, obſerving "that the terms to which the plaintiff acceded of taking the ſhip *with all faults*, and without warranty, muſt be underſtood to relate only to thoſe faults which the plaintiff could have diſcovered, or which the defendants were unacquainted with."

Lord ELLENBOROUGH.—I cannot ſubſcribe to the doctrine of that caſe, although I feel the greateſt reſpect for the authority of the Judge by whom it was decided. Where an article is ſold *with all faults*, I think it is quite immaterial how many belonged to it within the knowledge of the ſeller, unleſs he uſed ſome artifice to diſguiſe them, and to prevent their being diſcovered by the purchaſer. The very object of introducing ſuch a ſtipulation is to put the purchaſer on his guard, and to throw upon him the burthen of examining all faults, both ſecret and apparent. I may be poſſeſſed of a horſe I know to have many faults, and I wiſh to get rid of him for whatever ſum he will fetch. I deſire my ſervant to diſpoſe of him, and inſtead of giving a warranty of ſoundneſs, to ſell him *with all faults*. Having thus laboriouſly freed myſelf from reſponſibility, am I to be liable if it be afterwards diſcovered that the horſe was unſound? Why did not the purchaſer examine him in the market when expoſed to ſale? By acceding to buy the horſe with all faults, he takes upon himſelf the riſk of latent or ſecret faults, and calculates accordingly the price which he gives. It would be

moſt inconvenient and unjuſt if men could not by uſing the ſtrongeſt terms which language affords obviate diſputes concerning the quality of the goods which they ſell. In a contract ſuch as this, I think there is no fraud, unleſs the ſeller by poſitive means renders it impoſſible for the purchaſer to detect latent faults; and I make no doubt that this will be held as law when the queſtion ſhall come to be deliberately diſcuſſed in any court of juſtice.

The *Attorney General* then ſaid, he was inſtructed he ſhould be able to ſhew, that when the defendant himſelf purchaſed this ſhip, her flooring was taken up, and her ſeams were open, ſo that he muſt have ſeen her floor timbers broken and her knees decayed; and that before expoſing her to ſale to the plaintiff, he purpoſely nailed down the flooring, and cloſed the ſeams, that theſe defects might not be diſcovered.

Lord ELLENBOROUGH ſaid, he would receive this evidence. — It appeared, however, that no artifice of this ſort had been employed, and that while the ſhip was on ſale, thoſe who were in treaty for her had a full opportunity of examining her condition. — Whereupon the *Attorney General* ſubmitted to a nonſuit.

The *Attorney General*, *Garrow*, and *Marryat* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Rogers* and *Seward*.]

Vide Parkinſon v. Lee, 2 Eaſt, 314. and the authorities there collected.

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Monday, Dec. 23.

ROBINSON *v.* TOURAY.

Where there is a policy on goods by ſhip or ſhips to be thereafter declared, if the broker by miſtake makes a written declaration upon goods by a wrong ſhip, to which the underwriters put their initials; he may afterwards in compliance with the orders of the aſſured, declare upon goods by another ſhip, without the aſſent of the underwriters, and without a freſh ſtamp.

THIS was an action on a policy of inſurance dated 17th July 1810, at and from Archangel to Great Britain, on goods to be thereafter valued and declared, by ſhip or ſhips. The intereſt was in *Brandt, Rodde & Co.* of Archangel.

On the 16th of October the brokers called on the underwriters to ſubſcribe the following declaration:

"The intereſt attached to this policy is hereby declared to be ſhipped on board the *Tweende Venner* and the *Neptunus*."

The defendant and the other underwriters put their initials to this declaration. However, it was a mere miſtake on the part of the brokers, *Brandt, Rodde & Co.* having no goods on board either of theſe ſhips, and having given no orders to declare upon them. On the 7th of November, the brokers being directed to declare upon the *America*, called upon the underwriters to ſubſcribe a declaration in the following form:

"The declaration of intereſt on this policy made 16th October by the *Tweende Venner* and *Neptunus* is hereby cancelled, and in lieu thereof, the following cargo *per America* is declared to form the intereſt, and is valued as follows, &c."

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The defendant did not ſign this laſt declaration, although it was ſigned by ſeveral of the other underwriters.—The cargo of the America was loſt by the perils of the ſea.

Garrow for the defendant inſiſted, that the policy never attached upon the *America*. When the intereſt was declared upon the *Tweende Venner* and the *Neptunus*, it was the ſame as if theſe two ſhips had been named in the policy, and another ſhip could not be ſubſtituted without the defendant's aſſent. — The ſtamp laws likewiſe prevented the ſubſtitution, even had it been made with the full aſſent of the defendant and all the other underwriters. Immediately upon the firſt declaration of intereſt, the policy was complete; and the underwriters would have been liable upon the ſhips therein ſpecified, had they brought any goods belonging to *Brandt, Rodde & Co.* After that, there could be no alteration in the ſubject matter inſured without a freſh ſtamp.

Lord ELLENBOROUGH. — I am of opinion that the declaration of intereſt does not require any aſſent on the part of the underwriters. They put their initials to it, not for the purpoſe of expreſſing their aſſent, but to authenticate the declaration, and to prevent fraud in changing the ſubject matter intended to be covered by the inſurance. The contract between the parties is complete when the underwriters have ſigned the policy. The declaration of intereſt is the mere exerciſe of a power conferred upon the aſſured. It is generally put upon the policy for convenience; but this

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this is not neceſſary; nor is there any neceſſity for its being in writing. There was here a blunder in the names of the ſhips firſt declared. If this was without fraud and without prejudice to the underwriters, I think it might be corrected without the aſſent of the defendant, and without a freſh ſtamp. It is the ſame as if a verbal meſſage had been ſent by a porter who miſdelivered it. The firſt declaration did not form any part of the contract. It was a corrigible miſtake, and it was corrected. The policy therefore attached upon the cargo of the America in the ſame manner as if no prior declaration had been made.

Another defence ſet up was, that the licence did not protect alien enemies. The plaintiff, however, had a verdict.

In the enſuing term *Garrow* moved for a new trial, on both grounds, taken at niſi prius. But upon the firſt the COURT refuſed a rule to ſhew cauſe, being clearly of opinion, that under the circumſtances of the caſe, the policy did attach on the cargo of the *America*.

The *Attorney General*, *Park*, and *Gaſelee* for the plaintiff.

Garrow and *Nolan* for the defendant.

[Attornies, *Greyſon & Co.* and *Peſmore.*]

Vide Harman v. Kingſton, *ante* 150.

BROWN

BROWN *v.* CARSTAIRS.

Tuesday, Dec. 24.

THIS was an action on a policy of insurance on goods at and from *London* to *Archangel*. The duration of the risk was described in the words of the common printed form — "until the goods should be there discharged and safely landed."

Upon a common policy on goods, the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this be the usual mode in which goods are landed at that port, although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees.

The declaration averred that the ship arrived at *Archangel*; but that before the goods were discharged or safely landed, they were seized and detained by the persons exercising the powers of government there.

As soon as the vessel arrived at *Archangel* her hatches were sealed down, and a custom house officer remained constantly on board. Leave was refused to unload the cargo for several weeks; and at last it was unloaded into praams or lighters belonging to the government, under the inspection of an officer, and lodged in a government warehouse, where the consignees had no controul over it, and were not even permitted to see it. The whole was afterwards condemned, on the ground that the ship had come from *London*, instead of *Teneriffe* as was represented by the simulated papers which she carried.—It appeared, however, to be the uniform course of transacting business at *Archangel*, that when a ship arrives her hatches are sealed down, that a custom house officer remains on board till she is unloaded, and that the goods must be carried in the first instance to the

1811. government warehouſes, where they remain till the duties are paid.

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The *Attorney General* for the plaintiff inſiſted, that the goods in queſtion never had been *ſafely landed*, and that the underwriters were reſponſible for the loſs, which muſt be referred back to the time when the cargo was diſcharged from the ſhip into the government praams under the inſpection of a government officer. By *ſafely landed* muſt mean, landed ſo as to be once in the poſſeſſion and under the controul of the conſignees. It muſt be a landing which is available and beneficial to the perſons intereſted. Had the goods been captured at ſea and carried into *Archangel*, in one ſenſe they would have been ſafely landed there; and it was only in that ſenſe they could be ſaid to have been ſafely landed as the caſe actually ſtood. He referred to the caſe of *Waples* v. *Eames*, *Str.* 1243, in which Lord C. J. LEE is ſtated to have held, that a ſhip is not to be conſidered as having been moored 24 hours in good ſafety, till ſhe has been ſo long in a condition to deliver her cargo. On the ſame principle, goods could not be ſaid to have been ſafely landed, which had never reached the hands of the conſignees.

Lord ELLENBOROUGH. — The queſtion here is, whether theſe goods were ſeized and detained by the Ruſſian government *before* they were diſcharged and ſafely landed. I ſee no evidence of ſuch ſeizure or detention. The goods were landed according to the uſual courſe of trade at the port of *Archangel*. This is all the underwriters undertook for. The policy ſays nothing

nothing of the goods being in the poſſeſſion or under the controul of the conſignees. At almoſt every port in Europe where a revenue is raiſed upon goods imported, the conſignees have not the dominion over the goods till the duties are paid, and the goods may at any time be ſeized if they are found to be contraband. But if the goods are once landed in the uſual courſe of buſineſs, the underwriters on ſuch a policy as the preſent are not liable for any ſubſequent loſs. It was meant to indemnify againſt *marine* not *terrene* perils. If perſons would be ſecured againſt the cupidity of foreign governments, or the inforcement of fiſcal regulations when the goods are once aſhore at the port of deſtination, the inſtrument muſt be differently framed. This policy cannot receive the extenſion contended for, without the greateſt injuſtice to the underwriters, and that uſeful body of men muſt abandon the practice of inſuring altogether if new riſks are thrown upon them for which they never became reſponſible.

Verdict for the defendant.

The *Attorney General*, *Garrow* and *Marryat* for the plaintiff.

Topping, *Scarlett* and *Campbell* for the defendant.

[Attornies, *Crowder & Co.* and *Blunt & Bowman.*]

Vide Bell v. Bell, 2 Campb. 475.

1812.

Saturday, Jan. 11.

THACKRAY *v.* BLACKETT.

The drawer of two bills of exchange, before they became due received notice that they were accidently deſtroyed, and was called upon to give others in their ſtead according to the ſtatute 9 & 10 W. 3. c. 17. — When the bills were drawn, he had no effects in the hands of the acceptors, but before either was due, the acceptors were indebted to him to an amount leſs than one of the bills, and became bankrupt. *Held*, that he was nevertheleſs entitled to notice of the diſhonour of both bills.

THIS was an action on two bills of exchange drawn by the defendant on *Preſton & Sons*, payable to his own order, and indorſed by him to the plaintiff. The firſt for 1833*l.* 7*s.*, was dated 10th October 1809, the other for 1835*l.* 18*s.* 9*d.*, the 17th of October 1809, and both were at 6 months after date.

After the bills had been accepted and indorſed, and ſome time before either was due, they were left for payment with the acceptors, who by miſtake deſtroyed them. The plaintiff immediately gave notice of this circumſtance to the defendant, and required him, as drawer, to give new bills in their ſtead according to the ſtatute 9 & 10 W. 3. c. 17. This the defendant refuſed to do. In a few days after, *Preſton & Sons* became inſolvent. The bills, however, as they reſpectively became due, were preſented for payment; but no regular notice was ſent to the defendant of their diſhonour. The bills were drawn merely for the defendant's accommodation; but before they became due, he had contracted engagements on account of *Preſton & Sons* to the amount of about 1000*l.*, and they were ſo much indebted to him at the time when they ſtopped payment. — The objection being taken, that the defendant was diſcharged for want of due notice of the diſhonour of the bills,

The *Attorney General* for the plaintiff contended, that under the circumſtances of the caſe no ſuch notice was neceſſary. Before the bills were due the defendant

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fendant was informed they were deſtroyed; and being likewiſe aware that the acceptors were inſolvent, he muſt have known perfectly well that they could not be paid. Notice of the diſhonour of the bills would have given him no information, and he could not poſſibly have ſuffered any prejudice from the want of it. At any rate, the objection could only apply to the firſt bill; for that alone would abſorb the whole balance due from the acceptors, and leave the other a pure accommodation bill from its date till the moment it became due.

Lord ELLENBOROUGH. — It is well ſettled that the inſolvency or bankruptcy of the acceptor does not diſpenſe with due notice of the diſhonour of the bill being given to the drawer. Then, does it make any difference in this caſe that the bills were deſtroyed before they became due? I think not; for they might ſtill have been paid with or without an indemnity, and the defendant not hearing that they were diſhonoured, might have been prevented from preſſing his remedy againſt the acceptors. The excuſe of want of effects in their hands, I think, is equally unavailing as to both bills. I cannot make any diſtinction between the two. If there was an open account between the parties, and the acceptors were indebted in any ſum to the drawer before the bills became due, I cannot ſay that he muſt neceſſarily have been aware before hand that either of them would be diſhonoured. Judges of great authority have doubted of the propriety of the rule laid down in Bickerdike *v.* Bolman; and I certainly will not give it any extenſion.

Plaintiff nonſuited.

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In the enſuing term the *Attorney General* was refuſed a rule to ſhew cauſe why there ſhould not be a new trial, all the Judges being of opinion that the defendant was entitled to notice of the diſhonour of both bills.

The *Attorney General*, *Garrow* and *Copley* for the plaintiff.

Park, *Topping* and *Holroyd* for the defendant.

[Attornies, *Lambert* and *Flenney*.]

Vide Hamond v. Dufreſne, *ante* 145.

Saturday, Jan. 11.

CLEGG v. LEVY.

If a ſtamp is neceſſary to the validity of an agreement made in a foreign country, an agreement made there, unleſs it has ſuch ſtamp, cannot be received in evidence in our courts of juſtice. But it is incumbent upon the party who objects to the validity of the agreement, to prove the law requiring the ſtamp, by an authenticated copy, if it be in writing, and if not, by the teſtimony of a witneſs acquainted with the laws of the foreign country.

TO an action for goods ſold and delivered, the principal defence ſet up was, a partnerſhip between the plaintiff and defendant in reſpect to the goods in queſtion. To prove this, an unſtamped agreement was put in, which had been ſigned by the parties at *Surinam*. The witneſs who proved the plaintiff's ſignature to it, had reſided as a merchant in *Surinam*, and ſtated that in that colony all agreements muſt be ſtamped to be of any validity, and that there is a written law of the colony to this effect.

Lord

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Lord ELLENBOROUGH. — I ſhould clearly hold, that if a ſtamp was neceſſary to render this agreement valid in *Surinam*, it cannot be received in evidence without that ſtamp here. A contract muſt be available by the law of the place where it is entered into, or it is void all the world over. But I muſt have more diſtinct evidence of the law of *Surinam* upon this ſubject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman ſuppoſes that it applies to all agreements, it may poſſibly contain an exception, like our own ſtamp act, as to agreements for the ſale of goods, wares, and merchandizes. In the caſe of *Bohtlingk v. Inglis* (*a*), reſpecting the right to ſtop in tranſitu in *Ruſſia*, Lord KENYON required the written law of *Ruſſia* upon this ſubject to be given in evidence. I will therefore admit this agreement to be read, unleſs you prove in the ſame way, that by the law of *Surinam* a ſtamp was neceſſary to give it validity.

The agreement was read accordingly, but did not apply to the goods in queſtion; and the plaintiff had a verdict.

Topping and *Comyn* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Cramb* and *Howard*.]

(*a*) 3 Eaſt, 381. and ſee 1 Eaſt, 515.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM IN LONDON,

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HUSSEY *v.* CRICKITT.

An action may be maintained upon a wager of *a rump and dozen*, whether the defendant be older than the plaintiff.

When a dinner is ordered at a tavern by the authority of two perſons who have laid a wager of *a rump and dozen*, if the winner pays the bill, he may maintain an action againſt the loſer for *money paid* to recover the amount.

THIS was an action upon a wager of *a rump and dozen*, whether the defendant was older than the plaintiff.

The declaration contained ſeveral ſpecial counts upon the wager, and the uſual money counts.—Plea, *the general iſſue.*

It appeared that the wager was laid in May 1809, when the plaintiff, the defendant and ſeven other gentlemen were dining together in *Furnival's Inn Hall.* Nothing further was done in the buſineſs till the 8th of June in the following year. The parties then meeting again in the ſame place, it was reſolved that each ſhould name a friend for the purpoſe of appointing a day when the queſtion ſhould be decided by the production of the regiſters of baptiſm, and of ordering a dinner at a tavern for *the rump and dozen.* The plaintiff accordingly named *Mr. Hurd*, and the defendant *Mr. Keene*, who agreed in appointing the 14th

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14th of the ſame month, and ordered a dinner on that day for the parties and the other gentlemen preſent when the bet was laid, at the *Albion* tavern in *Alderſgate Street*. At the day appointed, it was found that the defendant was ſix years older than the plaintiff. He had notice of the dinner, but did not attend. The bill which amounted to 18*l.* was paid in the firſt inſtance by *Mr. Hurd*. He was repaid, however, by the plaintiff before action brought.—The witneſſes ſtated that *a rump and dozen* means a good dinner and plenty of wine for the perſons preſent.

Vaughan Serjeant, for the defendant inſiſted, that no action could be maintained upon ſuch a wager on account of its uncertainty, frivolity, ludicrous nature, and immoral tendency. He relied upon *Brown v. Leeſon* 2 *H. Bl.* 43, in which Lord LOUGHBOROUGH refuſed to try an action on a wager, "whether there are more ways than ſix of nicking ſeven on the dice, allowing ſeven to be the main, and eleven a nick to ſeven," and *Henkin v. Gerſs*, 2 *Campb.* 408, in which Lord ELLENBOROUGH in the ſame way refuſed to try an action on a wager between two attornies, "whether a perſon may be lawfully held to bail on a ſpecial orginal for a debt under 40*l.*" At any rate, the plaintiff could not be entitled to more than the value of one dinner to be eaten by himſelf. The amount of the tavern bill could in no caſe be conſidered money paid by him to the defendant's uſe.

Beſt, Serjeant, and *Campbell*, contrà, inſiſted, that the caſe before Lord LOUGHBOROUGH proceeded merely on

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on this ground, that the wager was reſpecting the mode of playing at *Hazard*, a game forbid by act of parliament; and in *Henkin v. Gerſs* nothing more was laid down by Lord ELLENBOROUGH, than that an action cannot be maintained on a *point of law* in which the parties have no intereſt. But the general rule is, that wagers are lawful; and this does not come within any of the exceptions to the rule, not being againſt public policy, not injuring the character or feelings of a third perſon, not leading to indecent evidence, and having no tendency to immorality. The queſtion here was quite harmleſs. Whether or not a bet upon the age of a ſtranger would be legal, there could be no objection to two gentlemen betting on their own. And inſtead of any public prejudice ariſing from the thing betted, it is for the public benefit to promote conviviality and good humour. Neither could it be ſaid that the plaintiff's loſs even of his own ſhare of the entertainment which the defendant had promiſed to give, was frivolous in the eye of the law. It was lately decided in the Exchequer Chamber, that the loſs of the hoſpitality of friends is a ſufficient temporal damage to found an action. *Moore* v. *Meagher*, 1 *Taunt.* 39. The ludicrous nature of the wager is too looſe a ground to proceed upon; and till the law of England, in imitation of the civil law, (*a*) ſhall refuſe to take cognizance of *ſponſiones ludicræ* altogether, it will be very difficult to decide which are ſufficiently

Although the rule of the civil law was, that no gaming or betting ſhould be permitted, to this there were ſeveral exceptions, among which there is one bearing ſome reſemblance to a wager *of a rump and doxen*: "Quod in convivio, veſcendi cauſâ ponitur, in eam rem familiæ ludere permititur." Dig. lib. xi. tit. v. 4.

grave, and which are too laughable for the conſideration of a court of juſtice. Actions have been tried and ſanctioned by the greateſt Judges who have ſat in Weſtminſter Hall, upon wagers quite as ludicrous as the preſent. Thus in *Pope v. St. Leger*, 1 *Salk.* 344, an action was tried before Lord HOLT upon a wager, "whether a perſon playing at backgammon having ſtirred one of his men without moving it from the point, was bound to play it;" and that venerable Judge called in the aſſiſtance of the *Groom Porter* to decide the controverſy. So Lord KENYON held, that an action might be maintained, to recover the ſum of 3*l.* 10*s.* which the plaintiff had won from the defendant at the game of *All Fours*, the rules of which muſt have been explained and proved during the trial. *Bulling* v. *Froſt*, 1 *Eſp. Caſ.* 236. And in *M'Alleſter v. Haden* 2 *Campb.* 438, Mr. Juſtice LAWRENCE, a Judge no wiſe inferior in learning or ability to either of the other two, without any heſitation allowed the plaintiff to recover in an action upon a wager of "ſix to four that *Bob Booty* ſhould win the King's plate at the next *Litchfield Races*," although this queſtion might have involved all the laws of the turf. — There could be as little doubt that the amount of the bill was money paid to the defendant's uſe. *Hurd* paid as the agent of the plaintiff, who was liable to the landlord for the whole. Therefore as ſoon as the plaintiff had repaid *Hurd*, he had a right to come upon the defendant for an indemnity. This was not a voluntary but a compulſory payment by the plaintiff of a ſum of money for which the defendant was liable. The law therefore implied a promiſe on the part of the defendant to repay it to the plaintiff, as money advanced at his requeſt.

Sir

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Sir JAMES MANSFIELD, C. J. felt conſiderable doubts how he ſhould diſpoſe of the cauſe, and deſired that it might be brought before the Court. In the mean time, he directed that if the jury believed that *Keene* had authority from the defendant to order the dinner, they ſhould find a verdict for the amount of the bill; and if he had not, then they ſhould only award the plaintiff a compenſation for the loſs of his ſhare of the dinner which the defendant ought to have given on loſing the wager.

The jury found for the plaintiff with 18*l.* damages.

In the enſuing term *Vaughan* Serjeant, obtained a rule to ſhew cauſe why the verdict ſhould not be ſet aſide and a nonſuit entered. In Eaſter term following, cauſe was ſhewn, and the queſtion was argued on the the ſame grounds which had been taken at niſi prius. In addition to the former deciſions, *Beſt*, Serjeant, cited *Earl of March v. Pigot*, 5 Burr. 2802, where two heirs apparent ran the lives of their reſpective fathers againſt each other, and no objection was made to the ſubject of the wager: But HEATH J., ſaid, that was a caſe not to be cited, being of very doubtful authority.

Sir JAMES MANSFIELD, C. J.—I am inclined to think I ought not to have tried this cauſe. I do not judicially know the meaning of *a rump and dozen*. While we were occupied with theſe idle diſputes, parties having large debts due to them and queſtions of great magnitude to try, were grievouſly delayed. However, the cauſe being here, we muſt now diſpoſe of it. There

ſeems

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ſeems great uncertainty as to what is meant by *a rump and dozen*, and it ſtruck me that *Keene* ought to have paid the dinner, and brought his action againſt the defendant. Upon conſideration, however, perhaps the plaintiff might repay *Hurd*, and bring the action by reaſon of his joint liability to the landlord.

HEATH, J.—I am rather ſorry this action has been brought, but I entertain no doubt that it is maintainable. Wagers are generally legal, and there is nothing to take this wager out of the common rule. We know very well privately that *a rump and dozen* is what the witneſſed ſtated, *viz.* a good dinner and wine, in which I can diſcover no illegality. Then it appears clear that the defendant is liable for the amount of the bill. *Keene* having authority from him to order the dinner, it was a joint contract with the landlord; and the plaintiff having paid the whole, he has a right to be reimburſed by the defendant.

CHAMBRE, J. Perhaps it would have been better if courts of juſtice had refuſed altogether to entertain actions upon bets; but I ſee nothing to diſtinguiſh this bet from others on which actions have been held to be maintainable. It is neither uncertain nor illegal. The witneſſes have explained *a rump and dozen* to mean a good dinner, and this is ſufficiently certain. Suppoſe an order were given to a tavern-keeper to provide *a good dinner*, would he have any difficulty in recovering for it whether it was eaten or not?—Then where is the immorality? Is it impoſſible for people to ſit down to a good dinner without being guilty of exceſs? I like-

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likewise think that as the parties were jointly liable, this is not a voluntary payment on the part of the plaintiff, and that he is entitled to recover the amount of the bill as money paid to the defendant's use.

Rule discharged.

Best, Serjeant, and *Campbell* for the plaintiff.

Vaughan, Serjeant, and *Scarlett* for the defendant.

[Attornies, *Blunford & Murray* and *Stott*.]

Vide Squires v. Whisken, *ante* 140.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Hilary Term,

52 GEORGE III.

FIRST SITTINGS IN TERM AT GUILDHALL.

1812.

Saturday, Feb. 1.

BOOTHBEY and Others *v.* SOWDEN.

THIS was an action againſt the defendant as acceptor of a bill of exchange for 297*l.* 19*s.*, dated 21 Aug. 1810, drawn by the plaintiffs, payable to their own order at 4 months after date. The plaintiffs ſought likewiſe to recover a balance of about 30*l.*, under counts for goods ſold, and money paid. Plea, the *general iſſue.*

A man being embarraſſed in his circumſtances, all his creditors ſign an agreement to give him time for the payment of their reſpective demands by inſtalments, and to take his promiſſory notes for the amount. — This agreement is binding upon each of them, the ſigning of the others being a ſufficient conſideration, and they cannot ſue for their original cauſe of action, without proving that the agreement has been broken on the part of the debtor.

The plaintiffs' caſe being proved, the defence ſet up was, that in February laſt the defendant being embarraſſed in his circumſtances, he was obliged to aſk time of his creditors, and that the plaintiffs along with all the reſt accordingly ſigned an agreement, of which the following is a copy:

"We

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BOOTHBY and Others v. SOWDEN.

"We the underſigned creditors of Robert Sowden "of Exeter, do hereby agree to grant him, 3, 6, 9 "and 12 months on the amount of our reſpective "demands, and to take his notes payable in London "for the ſaid amount, provided the reſt of the cre- "ditors will do the ſame.

"14 Feb. 1811."

Garrow for the plaintiffs contended, that this agreement was void for want of conſideration, and that at any rate the giving of the notes was a condition precedent, which the defendant was obliged to ſhew he had performed.

Lord ELLENBOROUGH.—There was a ſufficient conſideration for each of the creditors entering into this agreement, that it was ſubſcribed by all the others. If the plaintiffs could ſhew that the defendant had refuſed to give them the notes according to the terms of the agreement, they might be remitted to their original remedy. But I think that remedy is ſuſpended by the agreement, unleſs an infraction of the agreement on the part of the defendant, is proved by the plaintiffs.

Nonſuit.

Garrow and *Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Howard* and *Parton*.]

Vide Steinman v. Magnus, 11 Eaſt, 390. 2 Campb. 124. S. C. Bradley v. Gregory, 2 Campb. 383.

SECOND

SECOND SITTINGS IN TERM AT WESTMINSTER.

1812.

Monday, Feb. 3.

FENN, on the ſeveral demiſes of PEWTRISS and THOMPSON, *v.* GRANGER.

In ejectment on the ſeveral demiſes of two perſons, although the evidence ſhews the title to be excluſively in one of them, the other cannot be compelled to be examined as a witneſs for the defendant.

EJECTMENT for a meſſuage ſituate in the pariſh of *St. Giles in the Fields.*

A title having been made out in the leſſor *Pewtriſs* by conveyances from a perſon ſeized in fee,—

The defendant propoſed to call as a witneſs the other leſſor, *Thompſon*, in whom no title appeared, to prove that by the direction of *Pewtriſs* he had diſtrained upon the defendant for the rent of the premiſes in queſtion, and that *Pewtriſs* having thereby acknowledged a tenancy, had precluded himſelf from bringing an ejectment without a notice to quit.

An objection was taken, that a perſon who appeared on the record as a leſſor of the plaintiff, could not be compelled to give evidence.

On the other ſide it was inſiſted, that this rule applied only to thoſe who were parties on the record as plaintiffs or defendants; but the leſſor of the plaintiff in ejectment muſt be conſidered a ſtranger, as much as the leſſor in an action of covenant by the aſſignee of the reverſion. There was the leſs reaſon for the objection to the competency of *Thompſon*, as no title

1812.

FENN and Others v. GRANGER.

had been proved in him; and if he could not be examined, it would become a common practice in ejectment, where it was apprehended that the evidence of any particular person would be unfavourable to the action, to disqualify him by inserting in the declaration a demise in his name.

Lord ELLENBOROUGH.—When it is made out that a demise is inserted with such a view, the Court will know how to deal with it. Without any proof of that sort, I must consider all the lessors in ejectment as substantially the plaintiffs on the record. All are jointly liable for costs; that one upon whose title the recovery proceeds is generally the trustee of the other; and there are the same reasons for protecting them from being examined which have produced the general rule of law, that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favour.

The objection, however, was waived, and Mr. *Thompson* being examined stated, that the distress had been made by mistake and without any authority from *Pewtriss*. So the verdict passed against the defendant.

Park and *Marryat* for the lessors of the plaintiff.

Garrow and *Comyn* for the defendant.

[Attornies, *Palmer* and *Watson*.]

Vide Norden v. Williamson, 1 Taunt. 378. Rex v. Hardwick, 11 East, 578.

FIRST

FIRST SITTINGS AFTER TERM AT GUILDHALL.

1812.

Friday, Feb. 14.

ANDERSON *v.* HICK and Others.

THIS was an action againſt the defendants as acceptors of a bill of exchange drawn upon them by A. & J. Deykin payable to the plaintiff.

Where the drawee of a bill of exchange who had once refuſed to accept it, ſaid to the holder, "if you will ſend it to the counting houſe again, I will give directions for its being accepted,"—*Held* that he was not liable as acceptor, without evidence that the bill was again ſent back to his counting houſe for acceptance.

The defendants denied that they had accepted the bill.

A witneſs ſwore that the bill having been left for acceptance at the defendants' counting-houſe, was returned unaccepted, as Mr. *Keates* one of the defendants who ſuperintended the account between them and the drawers had been abſent; that ſoon after, the plaintiff met *Keates* in the ſtreet, and expreſſed ſome ſurprize that the bill had not been accepted; and that *Keates* then ſaid, "if you will ſend it to the counting-houſe again, I will give directions for its being accepted." The plaintiff could not prove that the bill was again ſent to the defendants' counting-houſe.

Park for the plaintiff contended that *Keates*'s words importing a promiſe to accept, were in law of themſelves an acceptance.

Lord ELLENBOROUGH.—This was only a conditional promiſe to accept, and could not operate as an

1812.

ANDERSON v. HICK and Others.

acceptance till the bill was sent back to the counting-house.

Plaintiff nonsuited.

Park and *Gurney* for the plaintiff.

Garrow and *Campbell* for the defendant.

[Attornies, *Jones* and *Nind*.]

Vide Johnson v. Collins, 1 East, 98. Clarke v. Cock, 4 East, 57. Wynne v. Raikes 5 East, 514.

Saturday, Feb. 15.

SHEPHERD v. HALL.

An indenture of apprenticeship is not void by 8 Ann. c. 9. although it was originally agreed between the master and apprentice's father, that a premium of 20*l.* should be paid, and the master afterwards, to reduce the amount of the duty, agrees to take 19*l.* 19*s.* 6*d.* which is the sum inserted in the indenture, and actually paid.

MONEY had and received, to recover back the sum of 19*l.* 19*s.* 6*d.* on the ground that it had been paid upon a consideration which had failed.

The plaintiff being about to put his son to the defendant as an apprentice in the business of a *pawn-broker*, it was agreed between the parties that a premium of 20*l.* should be paid. The defendant, however, afterwards said, it would make no difference if he received only 19*l.* 19*s.* 6*d.*, and that he should thus escape the payment of a certain share of the duty. The latter sum was accordingly inserted in the indentures and paid.

Stat.

Stat. 8 Ann. c. 9. § 32. enacts that the duty shall be paid upon the sum "which shall be given, paid, contracted *or agreed for*, with or in relation to every clerk, apprentice, or servant." It was therefore insisted that 20*l.* was the sum agreed for here, and that since the duty had not been paid upon that, the indentures were void, and the money might be recovered back as upon a failure of consideration.

1812.
SHEPHERD v. HALL.

Lord ELLENBOROUGH.—The sum agreed upon must mean the sum finally agreed upon, which in this instance was 19*l.* 19*s.* 6*d.*, and the duty being paid upon that sum, the indenture is valid, and the plaintiff has a full consideration for the premium.—It would have been necessary for him, besides, to have proved that he was imposed on by the defendant, and not *in pari delicto*.

Plaintiff nonsuited.

Garrow and *Comyn* for the plaintiff.

Park for the defendant.

[Attornies *Gregg* and *Mills*.]

POWELL, Assignee of the SHERIFF of MIDDLESEX, *v.* DUFF.

Monday, Feb. 17.

THE plaintiff declared in the common form upon a bail bond in the penal sum of 194*l.* conditioned for

If a party executes a bail bond before the condition is filled up, it is void.

1811. for the appearance of one J. S. at the return of a writ of special capias.

POWELL v. DUFF.

Plea, *non eſt factum*.

The atteſting witneſs ſwore that when the bond was to be executed, the defendant was in a great hurry to get away; that for this reaſon he executed it when only the penal part had been filled up, and that the condition was filled up after he had left the office.

Park contended, that for this reaſon the bond was void.

Garrow, contrà, inſiſted that this like all other contracts muſt be governed by the meaning of the contracting parties; that the defendant clearly authorized the filling up of the condition in its preſent ſhape; that the obligatory part of the inſtrument was enough to render it a binding deed; and that the caſe might be likened to a man ſigning his name on a blank ſtamp, by which he might be made liable as acceptor of a bill of exchange.

Lord ELLENBOROUGH.—A man may render himſelf liable as a party to a bill of exchange or promiſſory note, by ſigning his name on a blank ſtamp; but there are certain ſolemnities indiſpenſible to the validity of deeds. The defendant never did execute a bond with ſuch a condition. The condition is ſet out in the declaration as part of the inſtrument, and muſt have been ſo, or the plaintiff could not ſue as aſſignee.

5 The

The plea of *non eſt factum* muſt therefore be found for the defendant. 1812. POWELL v. DUFF.

The plaintiff ſubmitted to be nonſuited.

Garrow and *Eſpinaſſe* for the plaintiff.

Jervis for the defendant.

[Attornies *Blofield* and *Duff*.]

" If a blank be ſigned, and ſealed, and afterwards written; it is no deed." *Perk.* § 118. *Com. Dig.* "*Fait.*" *A.* 1.

COLES and Another, Aſſignees of WRIGHT, a Bankrupt, *v.* ROBINS and Others. Monday Feb. 17.

TROVER for houſehold furniture, plate and jewellery.

A trader ſends goods to an auctioneer to be ſold, and then goes to priſon, where he lies above two months. Within this time the auctioneer not knowing of the trader being in priſon, ſells the goods and accounts with him for the proceeds.

The bankrupt who was a ſilver-ſmith and jeweller, being embarraſſed in his circumſtances, in the end of October 1810 ſent the goods mentioned in the declaration to be ſold by the defendants, who are auctioneers, at their auction rooms in Covent Garden. A part of them was ſold on the 29th of October,

At the end of the two months, a commiſſion of bankrupt is ſued out againſt the trader.—*Held* that his aſſignees could not maintain trover for the goods againſt the auctioneer, and that the payment of the money to the trader under theſe circumſtances was protected by 1 Jac. 1. c. 15.

1812.

COLES and Another v. ROBINS and Others.

and the remainder in the beginning of November. On the 1st of November *Wright* surrendered himself to prison in discharge of his bail, and having lain there two months, a commission of bankrupt was sued out against him on the 1st of January following. There was no evidence that the defendants ever knew till then that he was in prison, or that he was not carrying on his business as usual. On the 26th of November they settled the balance of his account, and paid the sum of 111*l.* 8*s.* 6*d.* to his agent for his use.

It was contended for the plaintiffs, that as the act of bankruptcy clearly referred back to the bankrupt's first surrendering himself to prison, the goods in question must be considered as vested in his assignees from that time. The sale was therefore a tortious conversion of the goods by the defendants.

The defence was rested on stat. 1 Jac. 1. c. 15., which after defining in § 13. the powers of the assignees, provides by § 14. "That no debtor of the bankrupt "be hereby endangered for the payment of his or "their debt truly and *bonâ fide* to any such bankrupt, "before such time as he shall understand or know "that he has become a bankrupt." In *Wilkins v. Casey*, 7. T. R. 711. where a factor gave his acceptance to his principal, for the amount of goods sold on account after a secret act of bankruptcy of the principal, but without notice to the factor, and the factor afterwards, even with notice of the bankruptcy, paid his acceptance to the holder of the bill, this was held to be a payment protected by the above statute.

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COLES and Another v. ROBINS and Others.

King v. Leith, 2 T. R. 141. must be conſidered an authority the ſame way. It was there decided that if a trader become bankrupt by lying in priſon two months after an arreſt, his aſſignees may maintain an action for money had and received, againſt a perſon *who having notice that a commiſſion would be iſſued againſt him*, ſells his goods and pays him the produce before the two months are expired. But there the Judges lay all the ſtreſs upon the notice, and it clearly appears that if as here, there had been no evidence of ſuch notice, they would have held the payment protected. The ſituation of auctioneers would otherwiſe be the hardeſt in the world, for they have often no means of knowing the ſituation of a perſon whoſe goods they ſell; and even if they ſuſpect he has committed an act of bankruptcy, they cannot defend themſelves againſt an action at his ſuit, till a commiſſion of bankrupt is actually ſued out againſt him. *Foſter v. Allanſon*, 2 T. R. 479.

For the plaintiffs it was replied that 1 Jac. 1. c. 15. § 14. applies only to continuing dealings with the bankrupt, not to a ſingle tranſaction taking place after the act of bankruptcy; that auctioneers ſell goods ſent them under ſuch circumſtances at their own peril; and that it was at any rate incumbent on the defendants to prove that they had reaſon to ſuppoſe *Wright* remained carrying on his buſineſs in the month of November 1810.

Lord ELLENBOROUGH.—The ſtat. 1 Jac. 1. c. 15. contains a favourable proviſion for perſons dealing with traders who have committed a ſecret act of bankruptcy, and

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COLES and Another v. ROBINS and Others,

and ought to receive a liberal conſtruction in reſpect to *bonâ fide* tranſactions. Theſe goods were put into the hands of the defendants before the bankrupt went to priſon, and when he had a complete controul over them. All the goods were ſold before a commiſſion was ſued out againſt him or he had lain two months in priſon. Then the ſtatute provides that no debtor of the bankrupt be endangered for the payment of his debt truly and *bonâ fide* before knowing he has become bankrupt. Were the defendants debtors of *Wright?* They certainly were as ſoon as they had ſold his goods and received the produce. Did they pay this debt truly and *bonâ fide?* This is not denied. Did they at the time of ſuch payment underſtand or know that he was become bankrupt? No evidence has been adduced to ſhew that they knew he had gone to priſon, and they could not prove a negative. If they had known the fact out of which the bankruptcy ſprung, this would have deprived them of the benefit of the ſtatute; but it was incumbent on the plaintiffs to prove notice as in *King v. Leith*, and in the abſence of ſuch proof, the preſent appears to be exactly that ſort of payment which the ſtatute was intended to protect.

Plaintiffs nonſuited.

Garrow and *Marryat* for the plaintiffs.

Topping and *Beſt* for the defendants.

[Attornies, *Maybew* and *Stokes*.]

HALL.

1812.

Tuesday, Feb. 18.

HALL *v.* PICKARD.

If the owner of a horse lets him to hire for a certain time, during which he is killed by the owner of a cart driving it violentlyagainst him, the remedy of the owner of the horse against the owner of the cart is *case* and not *trespass*.

THIS was an action on the case; and the declaration stated that before and at the time of the grievance complained of, the plaintiff was owner and proprietor of two horses, which were hired for a certain term to one W. C.; that at the time of the grievance they were in the possession of the said W. C., and drawing his carriage along the public highway; and that while they were in such possession the defendant drove a cart against them, whereby one of them was killed.

It appeared, that when the misfortune happened, the defendant was himself driving the cart with great impetuosity and violence.

Park thereupon objected, that the action ought to have been *trespass*, and not *case*, relying upon *Leame* v. *Bray*, 3 East, 393, and *Lotan* v. *Cross*, 2 Campb. 464.

Lord ELLENBOROUGH.—This is in the nature of an injury to the plaintiff's reversion. He was not in possession of the horses, and according to the authority of *Gordon* v. *Harper* (*a*), he neither could have maintained trespass nor trover for them. This is not like a gratuitous permission to use a chattel as in *Lotan* v. *Cross*, where the possession constructively remained in the

(*a*) 7 T. R. 9.

owner,

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HALL v. PICKARD.

owner. The horſes were let to hire for a certain term to *Dr. Carey*, who had a right to retain them till that was expired, and who was driving them by his own ſervants when the miſchief was done. Caſe therefore was here the proper and only remedy.—It may likewiſe be worthy of conſideration, whether in thoſe inſtances where treſpaſs may be maintained, the party may not waive the treſpaſs and proceed for the tort.

The plaintiff had a verdict.

Garrow and *Abbott* for the plaintiff.

Park and *Eſpinaſſe* for the defendant.

[Attornies, *Fines* and *Moore*.]

Vide Covell v. Laming, 1 Campb. 497. Rogers v. Imbleton, 2 N. R. 117. Huggett v. Montgomery, 2 N. R. 446.

Tueſday, Feb. 18.

HOLDEN q. t. v. LAWRIE.

In an action on 5 Eliz. c. 4. for ſetting on work one who has not ſerved an apprenticeſhip of 7 years, the defendant is not liable unleſs he knew that the perſon ſet on work had not ſerved an apprenticeſhip; but the Jury may infer that he knew this from his having had the means of knowledge.

THIS was an action againſt the defendant on 5 Eliz. c. 4. § 41. for having ſet on work in the buſineſs of a ſadler one *Manſel* who had not ſerved therein an apprenticeſhip of 7 years.

It was clearly proved that the defendant had employed *Manſel* in this buſineſs, and that *Manſel* had

previouſly

previouſly worked in it for a leſs period than 7 years, but when the plaintiff's caſe was cloſed, there was no evidence whatever, whether the defendant did or did not know of *Manſel*'s diſqualification.

1812.
HOLDEN q. t. v. LAWES.

Brougham for the defendant inſiſted, that he was on this ground entitled to a verdict. The words of the ſtatute are "upon pain that every perſon *willingly* offending or doing the contrary, ſhall forfeit and loſe for every default 40*s*. for every month." The forfeiture was thus incurred by offending *willingly*, not unintentionally; and for any thing that appeared, the defendant might have had the beſt reaſon to ſuppoſe that *Manſel* had ſerved an apprenticeſhip of 7 years to a regular ſadler.

Lord ELLENBOROUGH.—Certainly the defendant is not liable to the penalty, unleſs he knowingly employed a perſon who had not ſerved an apprenticeſhip, or neglected the proper means of information upon the ſubject. He muſt have offended *willingly*; but that man is a willing offender who ſins with knowledge, or who ſhuts his eyes to exclude it.—His Lordſhip called back *Manſel* to inquire what paſſed when he was hired; and upon that left it to the jury to ſay, whether the offence was wilful or not.

Verdict for the plaintiff for one penalty.

Garrow and *Lawes* for the plaintiff.

Brougham for the defendant.

[Attornies, *Chippendale* and *Fielder*.]

DOE

1812.

Thurſday Feb. 20.

DOE, d. LULHAM and Others, *v.* FENN.

In ejectment on the ſeveral demiſes of three perſons, each demiſe being of the whole, the leſſors of the plaintiff are entitled to a verdict, upon evidence that they jointly granted a leaſe to the defendant which has expired.

THIS was an ejectment for certain premiſes in the pariſh of *St. Pancras*. The declaration contained 1. A demiſe for the whole by *Edward Lulham;* 2. The like by *John Gregory;* and 3. The like by *John Crace;* all of which were laid on the 2d of October 1811.

A leaſe was given in evidence, dated 22d Auguſt 1780, whereby the leſſors of the plaintiff, *Gregory* and *Crace*, and *John Lulham* now deceaſed, father of the leſſor *Edward Lulham*, demiſed to the defendant for 30 years (*a*), and it was proved that the defendant had paid rent under this leaſe.

The *Attorney General* for the defendant contended, that it muſt be taken that *John Lulham*, *John Gregory*, and *John Crace*, who jointly granted the leaſe of 1780, were joint tenants, and there being no joint demiſe by them, the plaintiff could not recover. Each could not be entitled to the whole; therefore there could not be a verdict for the plaintiff generally upon each of the three demiſes; nor could the plaintiff recover the whole upon any one demiſe; for the leaſe of 1780 ſhewed that

(*a*) There was much diſcuſſion whether this inſtrument was more than an agreement; but Lord Ellenborough held that it operated as a leaſe.

there

there were three perſons jointly intereſted in the premiſes. It was neceſſary to ſhew the intereſt which each of the leſſors of the plaintiff had, and then there might be a verdict for ſo much, upon each of the demiſes. But there would be the greateſt incongruity if there were to be a general verdict for the whole upon each ſeparate demiſe; and this monſtrous injuſtice to the defendant would enſue, that each of the three leſſors might bring an action againſt him for meſne profits, in which the record in this cauſe would be concluſive evidence. The old *cantelena* was, that in laying demiſes in ejectment, "joint tenants muſt join, tenants in common muſt ſever, and parceners may either ſever or join." If this rule was to be relaxed, it was at all events neceſſary that where a perſon clearly entitled only to an undivided ſhare of the premiſes would recover upon a ſeparate demiſe of the whole, he ſhould ſhew to what ſhare he was entitled; or the jury had no grounds on which they could ſafely find a verdict in his favour.

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Doe, d. Lulham and Others, v. Fenn.

On the other ſide they relied upon *Roe d. Raper v. Lonſdale*, 12 Eaſt, 39.

Lord Ellenborough.—I am of opinion that the tenant ſhall not be permitted to ſet up any ſuch objection. It is proved that he held under the leſſors of the plaintiff, and that his term has expired. By the three ſeparate demiſes, the nominal plaintiff muſt be conſidered to have the ſame intereſt in him which was formerly conveyed to the defendant by the leaſe which has

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Doe, d. LULHAM and Others, v. FENN.

has expired. No incongruity will appear upo the record, for the premiſes are ſtated to be different in each demiſe; and no inconvenience will follow to the defendant, for only one writ of poſſeſſion can be taken out, and he can only be once removed from the occupation of the premiſes demiſed to him which he now wrongfully holds over. If more than one action ſhould be brought againſt him for meſne profits, or this judgment in ejectment ſhould be in any manner abuſed, it is always in the power of the court to ſtay proceedings and to prevent injuſtice.

Verdict for the plaintiff generally.

Garrow and *Marryat* for the leſſors of the plaintiff.

Attorney General and *Gaſelee* for the defendant.

[Attorneys, *Clark* and *Newcomb*.]

Vide Doe d. Marſack v. Read, 12 Eaſt, 57.

AD-

ADJOURNED SITTINGS IN LONDON.

1812.
Tuesday, Feb. 25.

BURBRIDGE *v.* MANNERS.

Notice of the dishonour of a bill of exchange or promissory note may be given the same day it becomes due, as soon as the acceptor or maker has refused payment.

THIS was an action on a promissory note for 101*l.* 15*s.* 5*d.* dated 11th October, 1810, drawn by *J. Finney*, payable 3 months after date at *Fraser & Co.*'s to the defendant, indorsed by him to one *Tinson*, and by *Tinson* to the plaintiff.

The note was regularly presented for payment in the forenoon of the day it became due, when payment was refused; and in the afternoon of the same day, the plaintiff caused notice of its dishonour to be sent to the defendant.

Park for the defendant objected that this was not sufficient notice of the dishonour. *Finney* the maker of the note had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonoured. The notice therefore stated what was untrue, and was evidently premature.

Lord ELLENBOROUGH.—I think the note was dishonoured as soon as the maker had refused payment on the day when it became due, and the notice sent to the defendant must have answered all the purposes

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for which notice in such cases is required. The holder of a bill or note gives notice of its dishonour in reasonable time the day after it is due; but he may give such notice as soon as it has been dishonoured the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information.

Although a bill of exchange cannot be reissued after it has arrived at maturity and been once paid, yet if it is paid and afterwards indorsed before it becomes due, it is a valid security in the hands of a bonâ fide indorsee.

By the defendant's evidence it appeared that this bill being in the hands of *Maude & Co.* was paid in by them when indorsed only by the defendant to their bankers *Masterman & Co.* who were to present it for payment. *Maude & Co.* had received it from *Finney* the maker, as a collateral security for an acceptance of his, then in their hands over due. On the 10th of January, four days before the note was due, some person unknown came to *Masterman & Co.*'s where it lay, paid it, and carried it away without its being cancelled, or any memorandum being made upon it. However, it had been indorsed by *Tinson*, and had come into the hands of the plaintiff, before it was due.

Park contended that after the bill had been once paid, it could not be reissued, and he relied upon *Beck* v. *Robley*, 1 H. Bl. 85. *n.*

Lord ELLENBOROUGH.—Payment means payment in due course, and not by anticipation. Had the bill been due before it came into the plaintiff's hands, he must have taken it with all its infirmities. In that case,

it would have been his buſineſs to inquire minutely into its origin and hiſtory. But receiving it before it was due, there was nothing to awaken his ſuſpicion. I agree that a bill paid at maturity cannot be reiſſued, and that no action can afterwards be maintained upon it by a ſubſequent indorſee. A payment before it becomes due, however, I think does not extinguiſh it any more than if it were merely diſcounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promiſſory notes; for it would be impoſſible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make ſome memorandum on bills and notes which have been paid; but if they do not, the holders of ſuch ſecurities cannot be affected by any payment made before they are due. While a bill of exchange is running, it remains in a negotiable ſtate. I cannot limit its negotiability the laſt 4 days before it becomes due more than the firſt 4 days after it is drawn.

Verdict for the plaintiff.

Garrow and *Reader* for the plaintiff.

Park and *Beſt* for the defendant.

[Attornies, *Harnam* and *Stokes*.]

1812.

HONEYWOOD, Bart. SHERIFF of KENT, *v.* PEACOCK.

In an action by the Sheriff on a bail bond, the bound bailiff who made the caption is a competent witneſs to prove the execution of the bond, if the defendant knowing his ſituation aſked him to become atteſting witneſs.

DEBT on a bail bond. — Plea *non eſt factum.*

One *Copland* being called as atteſting witneſs to prove the execution of the bond, it appeared from his examination on the *voire dire*, that he was a bound bailiff to the Sheriff of Kent; that the warrant againſt the perſon for whoſe appearance the bond was conditioned had been delivered to him; and that he made the caption accordingly; but that the defendant knowing all theſe facts, had requeſted him to witneſs the execution of the bond.

Puller for the defendant objected, that *Copland* was not a competent witneſs, as this in ſubſtance was his own action brought in the name of the Sheriff. — But —

Lord ELLENBOROUGH held, that the defendant could not take this objection, after having requeſted the witneſs, with full knowledge of the ſituation in which he ſtood, to atteſt the execution of the bond.

There was a verdict for the plaintiff upon *Copland's* evidence.

Marryat for the plaintiff.

Puller for the defendant.

FORSBOOM

1812.

Monday, March 2.

FORSBOOM *v.* KRUGER.

During a voyage the ſhip is wrecked, and the Captain gives the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging at the ſame time that he had hired them by the month. *Held* that under theſe circumſtances, no action for wages could be maintained by the mariners againſt the captain, at leaſt without proving that they had firſt made a demand upon the owners.

ACTION for wages earned by the plaintiff as a ſeaman on board the ſhip *Louiſe*, of which the defendant was captain.

In the voyage in queſtion the ſhip ſailed in ballaſt from *Hamburgh* to *Archangel*, and there took in a cargo, with which ſhe ſailed, and was wrecked a few days after. The captain and crew returned to *Archangel*. Whilſt there, the defendant gave the plaintiff an order on the owner of the ſhip, who reſided at Hamburgh, in the following form:

"Mr. J. W. Duncker,

"Pleaſe to pay againſt this my order, to the order "of the mariner C. J. Forſboom or the bearer of this, "according to the ſpecified amount delivered to you "from me. The value of which he has earned "during his engagement with me on board the Ham- "burgh bark Louiſe,

"EMANUEL KRUGER, *Captain.*"

"Archangel, 14th December 1810."

To this was ſubjoined an account containing the following item on the credit ſide.

"The above named mariner was hired by me at the wages of 5*l.* 5*s.* per month, was in ſervice until

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28th October 1810, makes 15 months 3 days, amounts to 79*l.* 5*s.* 6*d.*"

It was contended for the plaintiff, that this operated as an acknowledgment that wages were due to him at the above rate, for which the defendant as the perſon who hired him was perſonally liable.

On the other ſide it was objected, that under the circumſtances there could be no remedy againſt the captain, at all events till a demand had been made upon the owner. *Primâ facie* no wages were due, for no freight had been earned. The order only admitted that if wages were due, ſuch would be the amount of them. The defendant had by no means acknowledged his perſonal reſponſibility. From the loſs of the ſhip, he had no funds out of which he could pay wages, and the defendant by accepting the order had impliedly undertaken to make his demand in the firſt inſtance upon the owner.

Lord ELLENBOROUGH was of opinion, that till a demand had been made upon the owner in purſuance of the order, the action could not be maintained, and on this ground directed a nonſuit.

Garrow and *Andrews* for the plaintiff.

Scarlett and *J. Warren* for the defendant.

[Attornies, *Iſaacs* and *Wadſon.*]

Vide Johnſon v. Machielſen, *ante* 44.

ANDREW

1812.

Tuesday, March 3.

ANDREW *v.* ROBINSON and Others.

MONEY had and received to recover the ſum of 200*l.*

As ſoon as an inſurance broker has received credit in account with an underwriter for a loſs upon a policy, his principal may maintain *money had and received* againſt him to recover the amount; and in ſuch action if the underwriter's name is eraſed from the policy, the defendant can neither diſpute the liability of the underwriter for the loſs, nor his own receipt of the ſum ſubſcribed.

The plaintiff, a ſhip-owner at Hull, had employed the defendants, inſurance-brokers in London, to effect a policy for him from Halifax to England. This was ſubſcribed by one *Hodgſon* for 200*l.* The ſhip was loſt in the courſe of the voyage, and the underwriters agreed to pay a total loſs. The policy remained in the hands of the defendants, with whom *Hodgſon* adjuſted the loſs. His name was then eraſed from the policy. He did not actually pay any money to the defendants; but the amount of his ſubſcription was allowed between them in account.

Park for the defendants inſiſted, that the action could not be maintained, without ſhewing that money had actually been received by them from *Hodgſon*, and that at any rate, they were at liberty to prove that no loſs had happened for which the underwriters were liable.

Lord ELLENBOROUGH however held, that as the defendants had deprived the plaintiff of all remedy againſt the underwriter, and had received credit in account for the 200*l.*, they were eſtopped from ſaying

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ANDREW v. ROBINSON and Others.

that they had not this ſum in their hands for the plaintiff's uſe, — and the plaintiff had a verdict.

Garrow and *Marryat* for the plaintiff.

Park for the defendants.

[Attornies, *Sherwood* and *Kearſey*.]

Saturday, March 7.

MOXON *v.* ATKINS.

Policy on goods "at and from the ſhip's loading port or ports in *Amelia Iſland* to London."— The ſhip never touched at *Amelia Iſland*, but took in her cargo at *Tigre Iſland*, which lies a little farther up the *River St. Mary's*. — *Held* that the policy nevertheleſs attached, this being the uſual mode in which ſhips in that trade take in their cargoes.

THIS was an action on a policy of inſurance on goods on board the *Sheddens*, "at and from the ſhip's loading port or ports in Amelia Iſland to London."

Amelia Iſland lies near the mouth of the river St. Mary's, which divides Spaniſh America from the territories of the United States. There is no port of any ſort in the Iſland. A little farther up the river, is Tigre Iſland, which is quite uninhabited. Here ſhips generally lie to take on board the produce of the interior country brought down the river, although in ſome inſtances they make faſt to Amelia Iſland by an anchor put on ſhore, and load there. Having taken in their cargoes at Tigre Iſland, they drop down to Amelia Iſland, abreaſt of the town of Amelia, the reſidence of the Spaniſh Governor, where they pay duties and obtain their clearances.

The

The *Sheddens* on the voyage in queſtion, without touching at Amelia Iſland, took in her cargo at Tigre Iſland. This conſiſted of lumber brought down the river. She then ſet ſail, paid the duties and obtained her clearance at Amelia Iſland in the manner above deſcribed, and was loſt by the perils of the ſea on the voyage home.

The *Attorney General* for the defendant contended, that under theſe circumſtances the policy had never attached. The ſhip had never been at any loading port or ports in Amelia Iſland, and had taken in no goods there. Amelia Iſland and Tigre Iſland were as diſtinct as Great Britain and Ireland. What the ſecret underſtanding of the parties might be, was immaterial. The contract between them muſt be gathered from the language of the policy, and that made the riſk to commence upon a contingency which had never happened.

Lord ELLENBOROUGH. — The words of the policy cannot be literally underſtood, for there is no port in Amelia Iſland where the ſhip could load. The real queſtion is, whether there has been a loading at Amelia Iſland within the meaning of the parties when the policy was effected. Strictly and locally, there has been no loading at Amelia Iſland. But it is poſſible that in mercantile contracts, Amelia Iſland may denominate a region in which Tigre Iſland is comprehended. Eſſequibo has been held for ſome purpoſes to be part of Demarara, although the two ſettlements are quite diſtinct. There is the more familiar inſtance

of

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MOXON v. ATKINS.

of *Weſtminſter* being conſidered in *London*, the general name for the metropolis; yet we know that in ſtrictneſs *London* only comprehends the limits of the *City*. The circumſtance of the ſhip paying duties and clearing at Amelia Iſland may go a great way to ſhew that ſhips which do ſo are conceived to have loaded there. The queſtion here will be, whether upon the evidence this cargo can be ſaid to have been loaded at Amelia Iſland according to the uſage of ſuch voyages. If it was, the policy attached, although literally ſpeaking no part of the cargo had ever been upon Amelia Iſland.

The plaintiff had a verdict.

Topping and *Richardſon* for the plaintiff.

The *Attorney General* for the defendant.

Vide Vallance v. Dewar, 1 Campb. 503. Uhde v. Waters, *ante*, 16.

Saturday, March 7.

HYDE v. WILLIS.

Where the charterer of a ſhip to Jamaica and back, covenanted to load her there with a complete cargo of ſugar, and to pay freight for the ſame at the rate of 10*s.* 6*d.* per cwt. and his agent at Jamaica tendered a complete cargo to the captain, but inſiſted on his ſigning bills of lading for it at 10*s.* per cwt, which the captain refuſed to do; — *Held* that the charterer was liable for dead freight.

ACTION on a charter-party, for a voyage to *Jamaica* and back; whereby the defendant covenanted to load on board the ſhip at *Jamaica* a full cargo of ſugar, and to pay freight for the ſame at the rate of 10*s.* 6*d.* per cwt.

The

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HYDE. v. WILLIS.

The defendant's agent tendered the captain a cargo of ſugar; but inſiſted upon his ſigning bills of lading for it, at the rate of 10*s.* per cwt. The captain refuſed to take it on board on theſe terms; and the queſtion was, whether the defendant was liable for dead freight.

The *Attorney General* for the defendant inſiſted, that the captain was bound to take the cargo on board on the terms propoſed; and no prejudice could have ariſen from this to the plaintiff, as he might ſtill have ſued on the charter-party for freight at 10*s.* 6*d.* per cwt.

Lord ELLENBOROUGH. — Had the captain ſigned bills of lading at 10*s.* per cwt, he would have been bound to have delivered the goods on being paid at that rate; but the plaintiff was entitled to have a lien on the cargo for the full amount of the freight, as well as the ſecurity of the charter-party. I therefore think the defendant's agent had no right to annex any ſuch condition to the offer of a cargo as that the captain ſhould ſign bills of lading at a lower rate than that mentioned in the charter-party, and that the covenant to load a complete cargo has been broken in the ſame manner as if none had been offered.

Verdict for the plaintiff.

Garrow, *Topping* and *Taddy* for the plaintiff.

The *Attorney General* and *Park* for the defendant.

OOM

1812.

Saturday, March 7.

OOM *v.* TAYLOR.

Where goods insured were warranted free from seizure in the port of discharge, the captain having arrived within about two miles and a half from the harbour of the place to which he was destined, cast anchor and made a signal for a pilot: a pilot boat in consequence come out with douanniers on board, who carried him into the harbour, where the cargo was seized and condemned. *Held* that this was a seizure in her port of discharge within the meaning of the warranty.

POLICY of insurance on goods by the *Vrow Hendrika*, from London to any port or ports in the Baltic or Gulph of Finland, warranted free of capture and seizure in the port of discharge.

The ship was destined for *Rugenwald*. Having arrived within about two miles and a half from the harbour of this place, she cast anchor and made a signal for a pilot. A pilot-boat in consequence came off, but had douanniers on board, who carried the ship into the harbour, where the cargo was seized and condemned.

Lord ELLENBOROUGH was of opinion that this was a seizure in the port of discharge within the meaning of the warranty.

The plaintiff had a verdict for a return of premium, on account of the ship having sailed with convoy.

The *Attorney General*, *Garrow* and *J. Warren* for the plaintiff.

Park and *Topping* for the defendant.

[Attornies, *Gregson* and *Dennett*.]

MAYDHEW

MAYDHEW *v.* SCOTT.

Tuesday, Nov. 5. 1811.

If goods insured are warranted free from capture and seizure in the port of discharge, and the goods being destined to *Pillau* are seized while the ship is lying at anchor in *Pillau Roads*, this is a seizure in the port of discharge within the meaning of the warranty.

THIS was an action on a policy of insurance on goods on board the *Industry* "at and from London to the ship's port of discharge in the Baltic, warranted free from capture and seizure in her port of discharge."

The goods were consigned to a house at *Pillau*. The ship arrived in *Pillau Roads* on the 10th of December, 1810, and cast anchor about a German mile from the bar at the mouth of the river which leads up to the harbour. The captain went ashore on the 11th and returned on the 13th, finding he could not land the cargo at *Pillau*. He was then ordered to *Liebau*, but was detained in *Pillau Roads* till the 21st, when the ship and cargo were seized by the Prussian government. The witnesses stated that although what is called *Pillau Harbour* be two English miles within the bar, ships often unload a part of their cargoes in the *Roads* at the distance of two or three English miles from the shore before they are able to cross the bar or to get into the harbour.

Lord ELLENBOROUGH was clearly of opinion under these circumstances, that the ship was in her port of discharge within the meaning of the policy when lying in *Pillau Roads*, and that her seizure there was exactly the sort of loss against which the underwriters intended to guard themselves.

The plaintiff was nonsuited.

Garrow

1811.

MAYDHEW v. SCOTT.

Garrow and *Copley* for the plaintiff.

Park and *Scarlett* for the defendant.

[Attornies, *Willett* and *Blunt*.]

This ought to have been inſerted among the caſes after Michaelmas Term 1811. It was not brought before the court; but in *Dagleiſh* v. *Brook*, K. B. E. T. 1812, the Judges all agreed, that where the goods were deſtined to *Pillau*, a capture after the ſhip had caſt anchor in *Pillau Roads* was to be conſidered a capture *in the port of diſcharge*.—*Vide* Brown *v.* Tierney, 1 Taunt. 517. Baring *v.* Vaux, 2 Campb. 54. Jarman *v.* Coape, 13 Eaſt, 394. 2 Campb. 613. S. C.

OXFORD CIRCUIT.

LENT ASSIZES, 52 GEORGE III.

MONMOUTH.

CROWN SIDE. CORAM WOOD, B.

1812.
Saturday, March 28.

REX *v.* WILLIAM EDWARDS.

If during the trial of a prisoner for a capital offence, one of the jurymen is taken ill, the jury may be discharged and the prisoner tried by another jury.

THE prisoner was indicted for maliciously shooting at one *Lewis Roberts*.

When the evidence for the Crown had been nearly gone through, one of the jurymen fell down in a fit, and was carried out of court in a state of insensibility. After waiting some time, a surgeon who had attended him was sworn, and stated to the court that he had been attacked by an epileptic fit; that he was put to bed; that he remained insensible, and that there was no chance of his being able to return to do duty as a juryman that day.

WOOD, B. then said that under these circumstances he was of opinion the jury should be discharged, another

1812. other jury ſhould be ſworn and charged with the priſoner, and the trial begin *de novo.*

REX v. EDWARDS.

Clifford for the priſoner, objected to this courſe of proceeding. He contended that in capital caſes, after evidence has been gone through, the jury cannot be diſcharged, and that if from any circumſtance happening during the trial, it becomes impoſſible for the jury to find a verdict of *guilty*, this is a ſort of *Godſend* for the benefit of the priſoner.

WOOD, B. overruled the objection; but ſaid he would reſerve the point for the opinion of the Judges, if the priſoner was found guilty.

The eleven jurymen were then diſcharged from giving any verdict; their names were again called over, and a twelfth was put into the box; the priſoner was deſired, if he would, to challenge them as they came to the book to be ſworn; they were all ſworn without challenge; the officer charged them with the priſoner in the common form; the witneſſes for the crown were ſworn anew; and, by conſent, the evidence they had before given was read from the Judge's notes, and they were aſked whether it was true.

The priſoner was convicted.

In Eaſter Term following, the point was argued in the Exchequer Chamber before eleven of the twelve Judges. *Clifford* inſiſted for the priſoner, that he was not properly tried by the ſecond jury, when a former

jury had been charged to try him,—relying chiefly upon the authorities collected in the *Kinlocks' Caſe*, *Foſter*, 16. But the Judges, without hearing the other ſide, were unanimouſly of opinion that the conviction was right, and they mentioned a caſe before Mr. Baro ADAMS on the Weſtern Circuit, and another before Lord LOUGHBOROUGH at York, where under ſimilar circumſtances the like courſe had been purſued.

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REX v. EDWARDS.

Hughes and *Taunton* for the proſecution.

Clifford for the priſoner.

Vide Rex v. *Ann Scalbert*, *Leach. Cro. Caſ.* 706. The priſoner was tried for murder in the year 1794 before Mr. JUSTICE LAWRENCE, the only Judge abſent from the Exchequer Chamber on the above occaſion. During the trial one of the jurymen was ſeized with a fit, and carried out of court inſenſible. On evidence that he was unable to return, the learned Judge diſcharged the Jury, and ordered another to be ſworn. The priſoner was convicted and executed. *Vide etiam Rex* v. *John Stevenſon*, *Leach Cro. Cas.* 618, where the priſoner himſelf falling down in a fit during the trial, the jury was diſcharged, and upon his recovery he was tried and convicted by another jury.

GLOUCESTER.

CORAM WOOD, B.

1812.
Wednesday, April 1.

MALONEY, Esq. v. BARTLEY.

In an action for a libel in the shape of an extrajudicial affidavit sworn before a magistrate, a person who acted as the magistrate's clerk is not bound to answer whether by the defendant's orders he wrote the affidavit and delivered it to the magistrate, as he might thereby criminate himself.

THIS was an action against the defendant, who is the master of *a Subscription House* at Cheltenham, of which the plaintiff was a member, for a libel, charging that the plaintiff had proposed to the defendant that if he would allow false cards prepared by the plaintiff to be introduced into the club, the defendant should have a share of the profits. Plea, *Not Guilty*.

According to the opening of the plaintiff's counsel, the libel had been published by the defendant in the shape of a voluntary affidavit sworn extrajudicially before a magistrate at Cheltenham.—Notice was given to produce the affidavit, but it was not produced. For the purpose of giving secondary evidence of its contents, Mr. *Griffiths*, clerk to Mr. *Pruin*, who is clerk to the Cheltenham division of magistrates, was then called to prove that by the defendant's orders he had written the affidavit and delivered it to the magistrate before whom it was sworn. The witness declined to answer the questions put to him respecting the affidavit, on the ground that they tended to criminate himself.

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The counſel for the plaintiff inſiſted that he was bound to anſwer, as he could not be criminally liable for the contents of the affidavit. He acted merely in the capacity of clerk to the magiſtrate. He had no malice to the plaintiff, and could have no intention in what he did to ſcandalize any individual. When a perſon comes to lay an information before a magiſtrate, it would be too much to require that the clerk ſhould know in every inſtance whether the magiſtrate has juriſdiction, and if not, to puniſh him as a libeller for drawing or copying an affidavit. The point to be conſidered muſt be, whether he acts *bonâ fide*,—whether he means to diſcharge his duty as a magiſtrate's clerk, or to traduce the character of another. The mere copying of a libel is no offence, or the officer of the court whoſe duty it is to ſet out a libel in an indictment might himſelf be indicted.—Might not the witneſs be compelled to anſwer, whether he had copied the libel in a brief, or delivered a caſe containing a copy of it for the opinion of counſel? Where is the difference between that and writing a copy to be delivered to a magiſtrate? Suppoſe the witneſs as clerk were to read before a bench of magiſtrates a libellous affidavit which he had not previouſly ſeen, concerning ſome matter over which it is found they have no juriſdiction, could he be indicted for publiſhing a libel? Certainly not. The *quo animo* muſt always be looked to. *Actus non facit reum niſi mens ſit rea.* Here the witneſs cannot criminate himſelf by merely anſwering that as clerk to the magiſtrates he wrote the affidavit by the defendant's orders and delivered it to the magiſtrate before whom it was ſworn. Malice may often be inferred; but in this in-

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ſtance it is rebutted by the very circumſtances under which the witneſs acted and which are involved in the terms of the queſtions propoſed.

On the other ſide they relied upon *Rex* v. *Bear*, *Salk.* 417, where it is laid down by HOLT, C. J. "that the bare copying out of a libel by one that is "neither contriver nor compoſer, is highly criminal. "The eſſence of a libel conſiſts not in the infamous "matter, for if a man ſpeaks ſuch words, unleſs the "words be put in writing, he is not guilty of a libel; "but the nature of a libel conſiſts in putting this "infamous matter in writing. *In all caſes where a "man does that act which makes a thing to be what "it is, he is, and muſt be conſtrued to be the doer "of that thing.* Therefore he held, that writing "a copy of a libel was writing a libel, and if the law "were otherwiſe, men might write copies and print "them with impunity."

WOOD, B.—I think the queſtions propoſed, tend to criminate the witneſs. The affidavit which he is ſuppoſed to have copied and delivered to the magiſtrate is alledged by the plaintiff to be libellous, and it was extrajudicial. Therefore, all concerned in writing and publiſhing it, are in point of law guilty of a miſdemeanor. Had the affidavit been made in the courſe of a judicial proceeding, no indictment nor action could have been maintained againſt the clerk, whatever might be the nature of its contents. But the affidavit being voluntary and extrajudicial, I cannot take notice that the perſon before whom it is pretended

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tended to be ſworn was a magiſtrate, or allow any privilege to thoſe who were employed in framing it. The witneſs is in the common ſituation of a perſon who has without authority written a copy of a libel and delivered it to a third perſon. If his maſter, or if the magiſtrate had ordered him to do ſo, this would be no juſtification. It has been held, that the mere delivery of a libel to a third perſon by one conſcious of its contents, amounts to a publication and is an indictable offence. I take the queſtion to be, whether the witneſs was not concerned in writing the affidavit and delivering it to the magiſtrate; and this I am of opinion he is not bound to anſwer.

Plaintiff nonſuited.

The plaintiff's counſel tendered a bill of exceptions to this direction; but I underſtand the learned Judge has not been called upon to ſeal it, and that upon conſideration it has been dropped.

Jervis, *Taunton* and *Puller* for the plaintiff.

Dauncey and *Abbott* for the defendant.

In *John Lamb's Caſe*, 9 Co. 596. it is laid down that "if one writes a copy of a libel and does not publiſh it to others, it is no publication of the libel. But it is great evidence that he publiſhed it, when he, knowing it to be a libel, writes a copy of it; unleſs afterwards he can prove that he delivered it to a magiſtrate to examine it, for then the act ſubſequent explains his intention precedent."

The

An action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely ſpoken.

The important queſtion concerning written ſlander referred to in *Earl of Leiceſter* v. *Walter*, 2 *Campb.* 251, has at laſt been decided in the EXCHEQUER CHAMBER; and it is now ſettled that an action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely ſpoken.

The caſe of *Kaye* v. *Bailey* which I before mentioned, was allowed to drop, on account of the death of the defendant; but the ſame queſtion immediately after aroſe in the caſe of

Thorley v. *Earl of Kerry in Error.* This was an action for a libel contained in a letter addreſſed to *Lord Kerry*, and ſent open by one of his ſervants, who became acquainted with its contents. The libel charged His Lordſhip with being a hypocrite and uſing the cloak of religion for unworthy purpoſes.

The cauſe was tried at *Kingſton Spring Aſſizes* 1809, when there was a verdict for the plaintiff below, with 20*l.* damages. He had afterwards judgment in K.B. without argument; whereupon a writ of error was brought in the Exchequer Chamber.

In Eaſter term 1811 the caſe was argued by *Barnewall* for the plaintiff in error and *Dampier* for the defendant in error, and in Eaſter term 1812, judgment was given by SIR JAMES MANSFIELD, Chief Juſtice of the Common Pleas.

His Lordſhip obſerved this was certainly a libel for which the writer might have been indicted; but he had entertained conſiderable doubts whether it could be the ground of a civil action. As to a civil action, there ſeemed on principle to be no well founded diſtinction between written and unwritten ſlander. The reaſons given in the books for ſuch a diſtinction are very inſufficient. One reaſon is, that by writing the ſcandal becomes more diffuſed; but this is caſual, for words may be ſpoken under circumſtances which ſhall give them much more publicity and render them much more injurious than if they were committed to paper and ſhewn to a third perſon. Another reaſon is, that the writing of the ſcandal ſhews more malice in the defendant; but the true foundation of a civil action, is ſome damage ſuſtained by the plaintiff, not the malice which actuates the defendant. It was with great difficulty therefore His Lordſhip had brought his mind to yield to the authority of the caſes upon

the ſubject. There were caſes however eſtabliſhing this diſtinction above a century ago, and dicta to the ſame effect by Lord HALE, Lord HARDWICK, and other very learned and eminent Judges; and the Court could not now venture to overturn a rule ſanctioned by the practice of a century and the authority of ſo many great names.

Judgment affirmed.

Copy of ſentence of condemnation, not evidence, though handed over by aſſured to underwriters.

The copy of a ſentence of condemnation of a ſhip or cargo in a foreign Admiralty Court is not made admiſſible evidence for the underwriters, by being handed over to them by the aſſured along with other papers to ſatisfy them of the loſs.

Flindt v. *Atkins*, *Sittings at Weſtminſter after E. T.* 1811. Policy on goods from London to the Baltic. Loſs by capture. — Defence, that the ſhip had been condemned under an order of the government under which the aſſured lived.

To prove that the ſhip had been condemned, the counſel for the defendant offered in evidence a copy of the ſentence of condemnation handed over among other papers by the aſſured to the underwriters.

LORD ELLENBOROUGH. — This paper is not rendered evidence by being handed over in the manner deſcribed. I ruled the ſame point lately in the caſe of *Bell* v. *Carſtairs*. If you would prove the ſentence, you muſt produce it under the ſeal of the Court in the uſual way. — The plaintiff had a verdict.

Refuſal to deliver goods, by perſon ignorant of real owner, no evidence of converſion.

If A. into whoſe poſſeſſion goods happen to come, being ignorant that B. is the real owner, refuſes to deliver them to him till B. proves that he is ſo, this refuſal is no evidence of a converſion to enable B. to maintain trover againſt A. for the goods.

Green v. *Dunn*. *Weſtminſter Sittings after M. T.* 1811. — Trover for timber, which defendant found on his premiſes, and which had been depoſited there by the permiſſion of the ſervant of the former occupier.

The plaintiff to whom the timber belonged having demanded

manded it of the defendant, the latter ſaid: If you will bring any one to prove it is your property, I will give it you, and not elſe.

Lord Ellenborough.—This is a qualified refuſal, and no evidence of converſion.

Plaintiff nonſuited.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Easter Term,

52 GEORGE III.

FIRST SITTINGS AFTER TERM AT GUILDHALL.

1812.

Wednesday, May 13.

RUCKER AND ANOTHER *v.* HILLER.

If the drawer of a bill of exchange has reasonable ground to expect that it will be honoured on the strength of a consignment, he is entitled to notice of its dishonour, although no effects ever get into the hands of the drawee to pay it.

THIS was an action by the indorsees against the drawer of a foreign bill of exchange for £100. dated at St. Petersburgh, 15th July 1810, addressed to *Messrs. Coates, Cass, & Co.* London, payable at two months after sight, to the order of *Messrs. Schumacker & Co.*

The bill was refused acceptance; and the question was, whether the defendant was entitled to notice of its dishonour?—*Mr. Coates*, one of the drawees, being examined, stated that the defendant was sent out to Petersburgh to purchase goods, which were to be consigned

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signed to them in London: he accordingly consigned several cargoes to them, and drew bills upon them to a large amount: they accepted and paid bills so drawn for more than the value of all the consignments: the cargo, in respect of which the bill in question was drawn, had been detained in Russia for want of a licence, and was so materially damaged as to be hardly sufficient to pay the freight when it arrived: the defendant had considerably overdrawn his account with *Coates, Cass, & Co.* and from the time this bill was drawn till it became due, they had no effects of his in their hands from which they could have paid any part of it.

Park for the plaintiff contended, that this was a case where no notice was necessary. No case upon this subject had gone farther than Hammond v. Dufrene (*a*), in which his Lordship held, that if the drawee has any effects in his hands, at any time between the drawing of the bill and its becoming due, the drawer is entitled to notice. But here the drawees never had any effects in their hands out of which the bill could have been satisfied, and the drawer was not entitled to notice, as he could suffer no damage by the want of it.

Lord ELLENBOROUGH.—If there be a reasonable expectation, that a bill of exchange will be honoured upon the strength of a consignment, I am of opinion the drawer is entitled to notice of its dishonour, although it turns out that the drawee never has any

(*a*) *ante* 145.

effects

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effects in his hands to meet the payment of it. This cannot be considered visionary paper, with respect to which the custom of merchants need not be observed. The object of notice is not merely to enable the drawer to withdraw his effects from the hands of the drawee, but to provide for payment of the bill thus suddenly cast upon himself, and to make prompt arrangements suited to this unexpected emergency. Where the drawer has solid reason to believe that the bill will be honoured, he is necessarily damnified, and therefore he is discharged, by the laches of the holder.

Plaintiffs nonsuited.

Park and *Taddy* for the plaintiffs.

Topping and *Reader* for the defendant.

[Attornies, *Palmer & Co.* and *Bellamy*.]

Vide Thackray v. Blackett, *ante* 164.

ADJOURNED SITTINGS AT WESTMINSTER.

1812.
Friday, May 15.

BASTOW v. BENNETT.

An undertaking to be answerable to a given amount *for any goods supplied by A. to B.*, after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. But as soon as A. alters the credit on which he supplied the goods to B., the surety is discharged.

ASSUMPSIT on a guarantie, in the following form, signed by the defendant:

"London, 7th March 1810.

"I hereby undertake and engage to be answerable "to the extent of £300. for any tallow or soap sup- "plied by Mr. *Bastow* to *France & Bennett*, provided "they shall neglect to pay in due time."

The plaintiff immediately after supplied tallow and soap to *France & Bennett* to a large amount, at two months credit. They regularly paid him above £300.; but in the summer of 1810 they owed him a larger sum, and became considerably embarrassed in their circumstances. A meeting of their creditors was then held, at which it was agreed that the creditors should continue to supply them with goods payable in ready money, but that the payments made should be applied to the old debts till they were satisfied. The plaintiff opened a new account with *France & Bennett* on this footing, and they afterwards became bankrupt, being indebted to him for tallow and soap in the sum of £547. 10*s*. The balance of the first account, however, was nearly satisfied.

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Park for the plaintiff contended, on the authority of *Maſon* v. *Pritchard*, 12 *Eaſt*, 227. 2 *Campb.* 436. that the defendant was liable to the full amount of £300.

Gaſelee, contrà, inſiſted, that after the ſum of £300. had been once paid to the plaintiff by *France & Bennett*, the guarantie was exhauſted. In *Maſon* v. *Pritchard* the defendant became anſwerable for any goods the plaintiff *might ſupply*, which might well be conſtrued into a continuing guarantie: but the word here is *ſupplied*, which ſeems to contemplate a ſingle tranſaction. At any rate, the defendant could not be liable after a new mode of dealing had been introduced between the parties, and muſt have credit for the payments ſubſequently made on the old account.

Lord ELLENBOROUGH.—The defendant here became anſwerable for *any* ſoap or tallow ſupplied by the plaintiff to *France & Bennett*. Without the word *any*, it might perhaps have been confined to one dealing to the amount of £300.; but as it is actually worded, I am of opinion it remained in force while the parties continued to deal on the footing eſtabliſhed when it was given. But I think the goods ſupplied after the new arrangement were not within the ſcope of the guarantie, and that the defendant is only anſwerable for the unſatisfied balance of the old account.

Verdict accordingly.

Park and *Lawes* for the plaintiff.

Gaſelee for the defendant.

[Attornies, *Webb* and *Anneſley*.]

Vide Merle v. Wells, 2 Campb. 437.

1812.

REX v. Inhabitants of ST. GEORGE HANOVER SQUARE.

no anſwer to this indictment. They certainly do not expreſsly exempt the pariſh from the common law liability to repair all highways within its limits. Do they create any exemption by implication? I think not. The duty of repairing may be impoſed upon others, although the pariſh be ſtill liable. The pariſh muſt, in the firſt inſtance, ſee that the ſtreet is properly paved, and ſeek a remedy over againſt the Commiſſioners. The thouſand a year is an auxiliary fund; but will not prevent other means being reſorted to, which would have been available had the acts relied upon never paſſed.

Guilty.

Jekyll, *Alley*, and *Walford*, for the proſecution.

Garrow, *Marryat*, *Gurney*, and *Denman*, for the defendants.

[Attornies, *Field* and *Dawſon*.]

Vide Rex v. Sheffield, 2 T. R. 106. Rex v. Mayor of Liverpool, 3 Eaſt, 86. Rex v. Bridekirk, 11 Eaſt, 304.

Friday, May 22.

REX v. CROSS.

It is an indictable offence for ſtage coaches to ſtand plying for paſſengers in the public ſtreets.

THIS was an indictment for cauſing and permitting divers coaches to ſtand and remain for a long and unreaſonable time in the public highway near *Charing Croſs*, to the great annoyance of His Majeſty's ſubjects.

The

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The defendant is proprietor of a *Greenwich* ſtage-coach, which comes to *London* twice a day, and draws up at the place in queſtion, nearly oppoſite Meſſrs. *Drummond*'s banking-houſe. There it remains for about three quarters of an hour, taking in parcels and waiting for paſſengers. On *Sundays*, and occaſionally at other times, the defendant employs extra coaches, which ply there in the ſame manner. A great number of other ſtage-coaches from *Greenwich* and the adjoining villages come to the ſame ſpot. There are generally ſix or ſeven in a row cloſe to the curb ſtone; often two tiers, and ſometimes three. A number of perſons are employed to ſolicit paſſengers to go by theſe coaches. Private carriages can very rarely draw up to the oppoſite houſes, and conſiderable difficulty is experienced in paſſing along that ſide of the ſtreet.

It appeared that for a great number of years *Greenwich* ſtages have ſtopped and plyed at this place, but that their number has of late been greatly increaſed.

Garrow for the proſecution contended, that the defendant was clearly guilty of a public nuiſance, in keeping his coaches ſtanding in the public ſtreet ſuch an unreaſonable length of time; and he relied upon *Rex* v. *Ruſſell*, 6 *Eaſt*, 427, where it was held that a waggoner occupying one ſide of a public ſtreet in a city, before his warehouſes, in loading and unloading his waggons for ſeveral hours at a time both day and night, and having one waggon at leaſt uſually ſtanding before his warehouſes, ſo that no carriage could paſs on that ſide of the ſtreet, and ſometimes even foot paſſengers were incommoded by cumbrous goods lying

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lying on the ground on the ſame ſide ready for loading, was indictable for a public nuiſance, although there were room for two carriages to paſs on the oppoſite ſide of the ſtreet.

Marryat, contrà, inſiſted, that there was hardly any reſemblance between that caſe and the preſent. All that had been proved againſt the defendant was, that twice a day his coach drew up at the ſide of a very wide ſtreet, and remained there for a ſhort time to ſet down and take up paſſengers. He could not be anſwerable for any improprieties of which perſons connected with other coaches ſtopping there might be guilty. The practice of *Greenwich* coaches waiting at this place had prevailed ever ſince the building of *Weſtminſter Bridge*, and never was complained of till the preſent indictment was preferred. So in all the great avenues to the metropolis, there is ſome ſpot where ſtage-coaches going to particular villages aſſemble. A great ſhare of accommodation is thus afforded to the public, which much more than counterbalances any partial inconvenience which the practice may occaſion. If the defendant is guilty of a nuiſance, there might be an hundred indictments for the ſame offence, every time a *rout* is given by a faſhionable lady at the weſt end of the town.

Lord ELLENBOROUGH.—And is there any doubt that if coaches on the occaſion of a rout, wait an unreaſonable length of time in a public ſtreet, and obſtruct the tranſit of His Majeſty's ſubjects who wiſh to paſs through it in carriages or on foot, the perſons who cauſe and permit ſuch coaches ſo to wait are guilty of

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of a nuiſance? In meaſuring out the puniſhment, the Court would examine whether the act was repeated, and what degree of public inconvenience was experienced. But every unauthoriſed obſtruction of a highway to the annoyance of the King's ſubjects, is an indictable offence. Upon the evidence given, I think the defendant ought clearly to be found guilty. The king's highway is not to be uſed as a ſtable-yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuiſance. The ſtell fiſhery acroſs the river at *Carliſle* had been eſtabliſhed for a vaſt number of years; but Mr. Juſtice BULLER held that it continued unlawful, and gave judgment that it ſhould be abated. A ſtage-coach may ſet down or take up paſſengers in the ſtreet, this being neceſſary for public convenience; but it muſt be done in a reaſonable time; and private premiſes muſt be procured for the coach to ſtop in during the interval between the end of one journey and the commencement of another. No one can make a ſtable-yard of the king's highway.

Guilty.

Garrow and *Gurney* for the proſecution.

Marryat and *Adolphus* for the defendant.

[Attornies, *Webb* and *Sherman*.]

Vide Rex v. Jones, *poſt* 230.

NODIN

1812.
Friday, May 22.

NODIN *v.* MURRAY.

The duplicate of a writing taken from the autograph at one impreſſion, by means of a copying machine, cannot be read in evidence as an original.

TROVER for a ſhip.

In the courſe of the trial it was propoſed to give in evidence, as an original letter, a duplicate taken from the autograph, at one impreſſion, by means of a copying machine.—But,

Lord ELLENBOROUGH ſaid, he could only treat this as a copy, though it was likely to be more accurate than one taken by ſucceſſive imitations, and therefore it could not be read without a notice to produce the original written by the party's own hand.

The Defendant had a verdict.

Garrow, *Jervis*, and *Lamb*, for the Plaintiff.

Scarlett, *Puller*, and *Brougham*, for the Defendant.

[Attornies, *Rogers* and *Murray*.]

Saturday, May 23.

JONES *v.* WOOD ESQ. AND ANOTHER.

In an action againſt the ſheriff for a falſe return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to ſhew that this officer's name is written in the margin of the examined copy of the writ and return. But without producing the warrant, it was held to be enough to give in evidence a paper iſſued by the ſheriff's office and directed to this officer, requiring him to give inſtructions for making a return to the writ.

THIS was an action againſt the late ſheriff of the county of Middleſex, for falſely returning to a writ of *fieri facias*, that he had taken goods, which

remained

remained in his hands for want of buyers, although he had levied the money upon the goods, and ought to have had it in Court at the return of the writ.

One *Dowick*, an officer of the sheriff, was called, to prove that he had taken the goods, and that the money to be levied was paid to him to redeem them. The warrant was not produced; but in the examined copy of the writ and return, *Dowick*'s name appeared written on the margin. The plaintiff's counsel contended, that by the course of office this meant, that the warrant was directed to *Dowick*, to be executed by him; but Lord ELLENBOROUGH held it to be insufficient to connect the sheriff with his acts.

A paper was then given in evidence, which was produced, on notice, from the sheriff's office. This contained, first, an order to *Dowick* to give the necessary instructions for making a return to the writ in question; and then *Dowick*'s answer, in these words, "goods in hand, for want of buyers."—It was contended for the defendants, that nothing but the production of the warrant could render the sheriff answerable for the acts of the officer.

Lord ELLENBOROUGH, however, held that this paper amounted to a clear recognition by the sheriff that *Dowick* was the officer to whom the execution of the writ had been intrusted; and that if the money was paid to *Dowick* before the return of the writ, the sheriff must be considered guilty of having returned falsely that the goods remained in his hands for want of buyers.

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The plaintiff had a verdict for the amount of the sum to be levied.

Gaselee for the plaintiff.

Comyn for the defendant.

[Attornies, *Newcomb* and *Smith*.]

So, in an action of trespass against the sheriff for a wrongful act of the bailiff, it is not enough to prove that he is a general bailiff, and had given a bond of indemnity to the sheriff as such, and to prove a copy of the warrant under which he entered and seized the plaintiff's goods. Drake v. Sykes, 7 T. R. 113. *Vide* Blatch v. Archer, Cowp. 63. and M'Neil v. Perchard, 1 Esp. N. P. C. 263.

Saturday, May 23.

REX v. JONES.

It is an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber yard; though he should not be able otherwise to get them into his premises, or to carry on his business there.

THIS was an indictment for depositing, hewing, and sawing logs of wood in *St. John Street*.

It appeared that the defendant occupies a small timber-yard close by the spot in question, and that from the narrowness of the street, and the construction of his own premises, he had in several instances necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there, before they could be carried into his yard.

Marryat, as his counsel, contended, that he had a right to do so, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads

hogſheads of beer from their drays and letting them down into the cellar of a publican. 1812. Rex v. Jones.

Lord Ellenborough. If an unreaſonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuiſance. A cart or waggon may be unloaded at a gateway; but this muſt be done with promptneſs. So as to the repairing of a houſe;—the public muſt ſubmit to the inconvenience occaſioned neceſſarily in repairing the houſe; but if this inconvenience is prolonged for an unreaſonable time, the public have a right to complain, and the party may be indicted for a nuiſance. The rule of law upon this ſubject is much neglected, and great advantages would ariſe from a ſtrict and ſteady application of it. I cannot bring myſelf to doubt of the guilt of the preſent defendant. He is not to eke out the inconvenience of his own premiſes by taking in the public highway into his timber-yard; and if the ſtreet be narrow, he muſt remove to a more commodious ſituation for carrying on his buſineſs.

Guilty.

Garrow, the *Common Serjeant*, and *Richardſon*, for the proſecution.

Marryat for the defendant.

[Attornies, *Reynolds* and *Williams*.]

Vide Rex v. Croſs, *ante* 224.

AD-

ADJOURNED SITTINGS IN LONDON.

1812.

Tuesday, May 26.

M'CRAW v. GENTRY.

A person who sees an instrument executed, but is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness.

ACTION against the maker of a promissory note, which purported to be attested by two witnesses.

One of these being called to prove it, stated that he did not put his name to it in the presence of the defendant, nor was he ever called upon by the defendant to attest it; but he saw the defendant deliver it as his note of hand to the payee, and he afterwards put his name to it without the defendant's knowledge.

Lord ELLENBOROUGH.—I cannot receive the evidence of this person as of an attesting witness to the note. He was no attesting witness, but a mere volunteer. If the other person, whose name is on the note as attesting witness, really was so, it can only be proved by his evidence.

It appeared however that this person had put his name to it exactly under the same circumstances as the other, and the defendant's acknowledgment was con-

sidered sufficient to fix him. So the plaintiff had a verdict. 1812. M'CRAW v. GENTRY.

Garrow and *Littledale* for the Plaintiff.

Jervis for the Defendant.

[Attornies; *Bodfield* and *Johnson*.]

Vide Fitzgerald *v.* Elsee, 2 Camp. 635.

HEANNY and another, Assignees of MARCHAND a Bankrupt, *v.* BIRCH and another, Sheriffs of London. Tuesday, May 26.

TROVER for a fishing smack taken in execution after an act of bankruptcy.

If a fisherman buys fish at sea from other boats for the purpose of making up his cargo, which he carries ashore and sells, he is a trader within the meaning of the bankrupt laws; and if such be the usual practice of a particular class of fishermen, one of them who is proved to have once done so, will be presumed to have continued to carry on his business in the same manner.

The only question was as to the trading with reference to the petitioning creditor's debt, which became due in September 1811.

It was proved, that the bankrupt carried on the business of a fisherman from the port of *Barking* in Essex. Persons in this line, during the turbot season, which lasts about three or four months in the summer, generally sail over to the coast of Holland for the purpose of fishing. One boat very rarely catches a sufficient cargo to be carried to London in so short a time that the fish can be kept in good condition. They are therefore in the habit of buying fish from

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HRANNY and another v. BIRCH and another.

one another at sea, which they resell at Billingsgate. In the winter, the *Barking* fishermen go to the North Sea to catch cod, and usually, though not universally, buy from each other in the same manner. It was proved that during one turbot season some years ago, the bankrupt bought fish on the Dutch coast to fill up his cargo, which he resold in London; but there was no evidence of his having bought fish at any subsequent time. The witnesses stated, however, that he continued to go out to sea as a fisherman till the beginning of the present year, when he became bankrupt.

Marryat for the defendant contended, that the buying a few fish to make up a cargo, was not a substantive trading; but was merely incidental to the business of a fisherman, which clearly does not subject a person to the bankrupt laws. This man sought his living by catching fish from the sea, not by buying and selling them.—At any rate, allowing him to be a trader when he was proved to have bought fish to eke out his cargo on the Dutch coast, he must be taken to have ceased to be so before the petitioning creditor's debt accrued; and in that case, according to the authority of *Meggot* v. *Mills*, *Lord Raym.* 287. 12 *Mod.* 159. *S. C.* the commission could not be supported.

Lord ELLENBOROUGH.—The buying and selling of fish by a fisherman in the manner described, is certainly sufficient to make him a trader within the meaning of the bankrupt laws; and although this person is only proved to have bought and sold fish one season, I must presume that he still carried on his business in

the uſual way, and continued a trader down to the time of his bankruptcy.

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HEANNY and another v. BIRCH and another.

The plaintiffs had a verdict.

Garrow and *Lawes* for the Plaintiffs.

Marryat and *Walford* for the defendants.

[Attornies, *Atkinſon* and *Palmer*.]

GUEST *v.* CAUMONT.

Wedneſday, May 27.

In an action for uſe and occupation, although it be unneceſſary to ſtate in the declaration in what pariſh the premiſes are ſituate, if this is alledged, a variance in the name of the pariſh is fatal.

THE declaration alledged, that the defendant at London, in the pariſh of St. Mary le Bow, in the ward of Cheap, was indebted to the plaintiff for the uſe and occupation of certain premiſes *ſituate and being at London aforeſaid, in the pariſh and ward aforeſaid.*

The premiſes, for the uſe and occupation of which this action was brought, are ſituate in *the pariſh of St. Bride, in the ward of Farringdon Without.*

An objection being taken on account of this variance, the plaintiff's counſel contended that the mention of the pariſh and ward muſt merely be conſidered as *venue*; and at any rate that, as it is now ſettled by the recent caſe of *King v. Fraſer*, 6 East 348. that there is no occaſion to ſtate in the declaration where the premiſes are ſituate, the words "in the pariſh and "ward aforeſaid" might be ſtruck out as ſurpluſage:—But—

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GUEST v. CAUMONT.

Lord ELLENBOROUGH said, these words must be considered a local description of the situation of the premises, and could not be rejected, being by no means irrelevant. Therefore, as the premises occupied by the defendant were in a different parish and ward, the variance was fatal, and the plaintiff must be non-suited.

Garrow and *Lawes* for the plaintiff.

Marryat for the defendant.

[Attornies, *Willoughby* and *Mitchell*.]

Wednesday, May 27.

SCOTT *v.* CLARE.

To prove that the plaintiff was discharged under an insolvent act after the cause of action accrued and before action brought, it is not enough to give in evidence a parol acknowledgment by him; but the clerk of the peace should be called, and the order of sessions produced to shew the regularity of the discharge.

GOODS sold.—Plea, the general issue.

One defence set up was, that the plaintiff had been discharged under an insolvent debtor's act after the cause of action had accrued, and before the action was brought.—To prove the discharge, the defendant's counsel proposed to give in evidence a verbal acknowledgment by the plaintiff himself, upon the question being put to him.—But—

Lord ELLENBOROUGH said this was insufficient, as the discharge might be irregular and void, and the plaintiff might be mistaken; and that to prove a judicial act of this sort it was necessary to call the clerk of the peace, and give in evidence the order of the

court of quarter seſſions, by which the diſcharge was effected. 1812.

GUEST v. CAUMONT.

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

Scarlett for the defendant.

[Attornies, *Steventon* and *Reilly*.]

OVINGTON v. BELL AND ANOTHER.

Wedneſday, May 27.

THIS was an action for money had and received, to recover the ſum of £20. 2*s*. 3*d*.

Inſurance brokers holding a policy for the purpoſe of adjuſting a loſs, ſuffered an underwriter's name to be ſtruck out, upon his ſigning the adjuſtment;—he gave them credit in his books for the loſs, and became bankrupt; but they never took credit for the amount in their books;—on the contrary they gave the aſſured notice of the bankruptcy, and there was afterwards a ſettlement of accounts between the brokers and the aſſured comprehending the policy in queſtion, in which no demand was made upon them in reſpect of the bankrupt's ſubſcription.—Ruled, that they were not liable to the aſſured for the ſum due from the bankrupt on the policy.

The plaintiff, in March 1810, had employed the defendants as inſurance brokers, to effect a policy for him from London to Malta. This was ſubſcribed by one *Oſwin* for £200. A partial loſs happened, and an adjuſtment at £10. 2*s*. 3*d*. per cent. was ſigned by *Oſwin*'s agent in the beginning of July, when his name was eraſed from the policy, and credit given in his books to the defendants for the amount of the loſs. *Oſwin* about this time became bankrupt, but whether the adjuſtment was before or after his bankruptcy, did not diſtinctly appear. The defendants were privy to *Oſwin*'s name being eraſed from the policy, but they never took credit in their own books for the amount of the loſs; and on the 26th of July they gave

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notice to the plaintiff that *Ofwin* was bankrupt, and that he muſt prove the loſs under his commiſſion. In January 1811 there was a ſettlement of accounts between the parties, when the defendants paid the plaintiff £184. 9s. without any claim being made in reſpect of *Ofwin*'s ſubſcription.

Garrow, for the plaintiff, inſiſted, upon the authority of *Andrew* v. *Robinſon*, *ante* 199, that the defendants were ſtopped from diſputing that they had received the £20. 2s. 3d. from *Ofwin* to the plaintiff's uſe. By permitting the underwriter's name to be eraſed, they had deprived the plaintiff of his remedy on the policy; and when they had credit in account with the underwriter, it was the ſame as if the amount had been paid to them in caſh.

Lord ELLENBOROUGH.—I do not retract what I held in *Andrew* v. *Robinſon*; but the rule there laid down can only apply where the circumſtances are the ſame. Here it is proved that the inſurance broker never took credit in his account with the underwriter for the amount of the loſs; and it does not certainly appear even that the adjuſtment took place before the bankruptcy. But what makes an end of this caſe is, that though the plaintiff had notice of *Ofwin*'s bankruptcy in July, in the month of January following he ſettled an account with the defendants, including the very policy in queſtion, without making any complaint with regard to *Ofwin*'s name being ſtruck off the policy, or any demand of the ſum for which *Ofwin* was liable. This ſettlement of accounts, I think, clearly amounted to a waiver of any right he might have

have had upon the defendants, and was an election to seek his remedy under *Ofwin*'s commiſſion.

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OVINGTON v. BELL and another.

Plaintiff nonſuited.

Garrow and *Marryat* for the plaintiff.

Scarlett for the defendants.

[Attornies, *Swain* & Co. and *Palmer* & Co.]

Vide Edgar v. Bumpſtead, 1 Campb. 411. Bousfield v. Creſswell, 2 Campb. 545.

ORD AND TWO OTHERS v. PORTAL.

Wedneſday, May 27.

ACTION by the plaintiffs as indorſees againſt the defendant as acceptor of a bill of exchange, drawn by one *Sted*, payable to his own order, and indorſed by him in blank.

Where ſeveral plaintiffs ſue as indorſees of a bill of exchange, if the bill appears indorſed in blank, there is no neceſſity for their proving that they were in partnerſhip together, or that the bill was indorſed and delivered to them jointly.

The plaintiff's caſe being cloſed, without ſhewing that the plaintiffs were in partnerſhip, or that the bill had been indorſed to them jointly;

Garrow, for the defendant, inſiſted, that they ought to be nonſuited. The declaration alleged that the drawer of the bill indorſed and delivered the bill to the three plaintiffs, and there was no evidence whatſoever in ſupport of this allegation (*a*).

(*a*) In point of fact the plaintiffs were aſſignees of a bankrupt, and this bill was indorſed to them in payment of a debt due to the bankrupt eſtate.

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ORD and Two others v. PORTAL.

Lord ELLENBOROUGH.—There is no occaſion for any ſuch evidence. The indorſement in blank conveys a joint right of action to as many as agree in ſuing on the bill.

The plaintiffs had a verdict.

Marryat and *Curwood* for the plaintiffs.

Garrow and *Storks* for the defendant.

[Attornies, *Withey* and *Portal*.]

But where a bill of exchange is payable, or indorſed ſpecially, to *a firm*, Lord ELLENBOROUGH has often ruled that in an action by the payees or indorſees, ſtrict evidence muſt be given that the firm conſiſts of the perſons who ſue as plaintiffs on the record.

Thurſday, May 28.

FLOWER v. YOUNG.

In an action for ſtores ſupplied to a ſhip, if the defendant pleads in abatement that he is only liable jointly with others, it is not enough for him to produce the ſhip's regiſter, containing the names of himſelf and thoſe others as owners of the ſhip.

GOODS ſold.—Plea in abatement, that the promiſes were made by the defendant jointly with *Joſeph Metcalfe* and three other perſons named.

This was an action for ſtores ſupplied by the plaintiff in the year 1803 to the ſhip Swallow, of which the defendant had acknowledged himſelf to be then an owner.

Scarlett, for the defendant, propoſed to prove by the ſhip's regiſter, that *Metcalfe*, and the other perſons named

named in the plea, were co-owners at the time when the ſtores were ſupplied. 1812. FLOWER v. YOUNG.

Garrow, contrà, inſiſted that the regiſter was not evidence for this purpoſe, and relied upon *Tinkler* v. *Walpole*, 14 *Eaſt*, 226.

Scarlett contended that the caſe cited only determined, that the regiſter is not evidence to charge a perſon whoſe name appears upon it, and who has not ſigned it; but it may nevertheleſs be good *primâ facie* evidence for a perſon who adopts it.

Lord ELLENBOROUGH.—How can the regiſter be evidence *for* a man? If he has ſigned it, it is evidence *againſt* him; but it can amount to no more than a declaration that he is owner, which a man cannot convert into evidence of his own title. If the regiſter were recognized as a public document to prove the ownerſhip, it would be evidence both againſt and for all the perſons whoſe names appear upon it. However, we can conſider it as a private inſtrument only; and therefore, although it may be evidence as an acknowledgment againſt the perſons who ſign it, it cannot be evidence in their favour,—amounting to nothing more than their own declaration. I am ſorry this objection was ever taken, as there can be no doubt that in point of fact the regiſter does almoſt invariably diſcloſe the names of the true owners; and the practice of admitting it as *primâ facie* evidence, was extremely convenient. But the objection being taken, I am bound to decide, that in a caſe like this, the regiſter is not to be received. Therefore, unleſs the defendant can

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can prove by other media, that the perſons he has enumerated in his plea were joint owners of the ſhip in queſtion, there muſt be a

Verdict for the plaintiff.

Garrow and *Gifford* for the plaintiff.

Scarlett for the defendant.

So in the caſe of Pirie v. Anderſon, M. T. 1812, in which the above note was cited, the Court of C. P. determined that in an action on a policy on ſhip, the regiſter is no evidence to prove the allegation of intereſt.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

Thurſday, May 15.

GRAVES v. ARNOLD.

A local act of parliament provides that no action ſhall be commenced for any thing done *in purſuance* of the act until after notice of action ſhall have been given. *Held* that this applies to a caſe where the defendant acted under colour of the act, although he exceeded the powers conferred by it.

TRESPASS and falſe impriſonment. Plea, *Not Guilty.*

In the night of the 23d of January laſt, the plaintiff was apprehended by a watchman in the pariſh of St. Luke, in the county of Middleſex, on ſuſpicion of having broken a lamp, and carried to the watch-houſe of that pariſh, where the defendant was preſiding as conſtable. It was taken as a fact, that the watchman ſtated the reaſon for which he apprehended the plaintiff, and brought him there, but did not make a regular charge againſt him. The defendant ordered him to be detained all night in the watch-houſe, and

carried

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carried next morning before a magiſtrate, by whom he was diſcharged, as the watchman had not ſeen him break the lamp.

The defendant's counſel took a preliminary objection, that no notice of action had been given by the plaintiff. The police of this pariſh is regulated by ſtat. 50 G. 3. c. cxlix. intituled, "An Act for making "more effectual proviſion for lighting, watching, paving, cleanſing, regulating, and improving the ſtreets "and other public places in the pariſh of Saint Luke, "in the county of Middleſex." This act points out the manner in which conſtables and watchmen ſhall be appointed and do duty for the different diviſions of the pariſh. By § 68. it is enacted, that if any perſon ſhall break or injure any lamp erected by the truſtees within the pariſh, it ſhall be lawful for any one *who ſhall ſee ſuch offence committed*, to ſeize the offender, without any warrant, and to deliver him into the cuſtody of a peace officer, for the purpoſe of being carried before a magiſtrate. And § 173. provides, "that no action or "ſuit ſhall be commenced againſt any perſon or per-"ſons *for any thing done in purſuance of this act*, "until after twenty days notice in writing ſhall be "thereof given to the clerk or clerks to the ſaid "truſtees, or after ſufficient ſatisfaction made or ten-"dered, or after ſix calendar months next after the "fact committed, for which ſuch action or actions, "ſuit or ſuits, ſhall be ſo brought; and that the de-"fendant or defendants may plead the general iſſue, "and give this act and the ſpecial matter in evidence, "at any trial or trials which ſhall be had thereupon; "and that the matter or thing for which ſuch action

"or

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GRAVES v. ARNOLD.

"or actions, ſuit or ſuits, ſhall be brought, was done "*in purſuance and by the authority of this act.*" Even ſuppoſing that the defendant was entirely innocent of the offence charged upon him, and that the watchman was not juſtified in apprehending, or the defendant in detaining him, it was contended, on the authority of *Weller* v. *Toke*, 9 *Eaſt*, 364. that notice of action was neceſſary.

On the other ſide they inſiſted, that the proviſion as to notice applied only to the removing of buildings and other things done by the direct orders of the truſtees, and for which they would themſelves be anſwerable; that if the plaintiff was clearly innocent of breaking the lamp, his apprehenſion and impriſonment could in no ſenſe be ſaid to have been done *in purſuance of the act*; and that even if the defendant would have been entitled to notice, had he detained the plaintiff upon a groundleſs charge regularly made before him as conſtable, by detaining the plaintiff without any charge, he was in the ſituation of a common unprivileged wrong-doer.

Sir JAMES MANSFIELD, C. J. was of opinion, that notice was neceſſary, as the defendant was acting under colour of the ſtatute, and believed himſelf to be exerciſing the powers conferred by it, although by virtue of the ſtatute he might not be juſtified in what he did.

The plaintiff was nonſuited.

Lens, Serjeant, and *Bevan*, for the plaintiff.

Beſt, Serjeant, and *Campbell*, for the defendant.

[Attornies, *Parton* and *Kinſey*.]

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term,

52 GEORGE III.

FIRST SITTING AFTER TERM AT WESTMINSTER.

1812.

Thurſday, June 18.

MARGARET ALCIATOR *v.* SMITH.

ACTION by the indorſee againſt the drawer of a bill of exchange.—Plea, alien enemy.—Replication, that the plaintiff, before and at the time of the commencement of this ſuit, was reſident in this kingdom by the licence and permiſſion of our lord the king; whereupon iſſue was joined.

Where to a plea of alien enemy the plaintiff replied that ſhe was reſident in this kingdom by the licence and permiſſion of our lord the king,—*held*, that it was not enough to prove that a licence was granted to her under 38 Geo. 3. c. 77. which expired with that ſtatute; and that ſhe has ſince continued to reſide openly in this country without moleſtation.

The plaintiff, who is a native of France, came into this country in the year 1797, and has reſided openly in London ever ſince. On the 5th of October 1798, ſhe obtained a licence under 38 Geo. 3. c. 77. Soon after the paſſing of 43 Geo. 3. c. 155. ſhe regiſtered her place of abode at the Queen-Square Police Office; but ſhe obtained no other licence till 1ſt June 1812, when the preſent cauſe was at iſſue.

Garrow

1812.

MARGARET ALCIATOR v. SMITH.

Garrow for the plaintiff contended, that under theſe circumſtances ſhe muſt be taken to have been reſident here at the time of action brought by the permiſſion of our lord the king. His power to grant this did not depend upon the ſtatute, but was an inherent prerogative of the crown. Therefore the firſt licence of 1798 might ſtill be conſidered as in force. At any rate, from the long and unmoleſted reſidence of this lady in England, it might be preſumed that ſhe reſided here by the licence of the king, which need not neceſſarily be in writing.

Lord ELLENBOROUGH.—The firſt licence is not granted by the king in virtue of the prerogative royal, but by an officer of ſtate under the proviſions of a particular ſtatute; therefore when that ſtatute expired, the licence of 1798 muſt have expired along with it. The licence granted 1ſt June 1812 contains no recital of any permiſſion to the plaintiff to reſide here, and there is no evidence that Government knew of her being in this kingdom at the time when the action was commenced. How can the jury ſay, therefore, that ſhe was then reſident in this kingdom with the licence and permiſſion of our lord the king?

Plaintiff nonſuited.

Garrow and *E. Lawes* for the plaintiff.

Marryat for the defendant.

[Attornies, *Raphael* and *Hayward*.]

Vide Boulton v. Dobree, 2 Campb. 163.

FIRST

FIRST SITTINGS AFTER TERM IN LONDON.

ROCHE *v.* CAMPBELL.

1812.
Friday, June 19.

If a promiſſory note is made payable at a particular place, it is a fatal variance to omit to ſtate this in declaring on the note.

THIS was an action by the indorſee againſt the indorſer of a promiſſory note. The declaration ſtated the note to be made by one *Owen Saunders*, "by which ſaid note the ſaid *Owen Saunders* promiſed to pay to one *Richard Saunders* or order, "31 days after date of the ſaid note, the ſum of £40. "ſterling, value received of him."

The note given in evidence was in the following form:

"Ballindeary, Aug. 23, 1805.

"Thirty-one days after date, I promiſe to pay "Ric[d] Saunders Eſq. or order, *at the houſe of* "*Mr. Meade Niſbett, No. 6, Grafton Street, Dublin*, "the ſum of forty pounds ſterling, value received "of him.

"Owen Saunders."

(Indorſed)

"Rich. Saunders.

"J. Campbell."

Garrow, for the defendant, inſiſted there was a fatal variance in omitting to ſtate the place where the promiſſory note was made payable. The declaration ſet out an inſtrument on which the maker was univerſally

1812.
ROCHE v. CAMPBELL.

fally liable, without any demand of payment being made; but he could not have been ſued upon that given in evidence till payment had been previouſly demanded "at the houſe of Mr. Meade Niſbett, "No. 6, Grafton Street, Dublin."

Jekyll, contrà, inſiſted, that in an action againſt the indorſer it was not neceſſary to allege where the note was payable. The declaration averred, that it had been duly preſented for payment. Whether it had or not, was matter of evidence. The inſtrument produced did contain a promiſe by *O. Saunders* to pay *R. Saunders*, or order, the ſum in queſtion, at 31 days after date. The allegation and the proof, therefore, completely correſponded.

Lord ELLENBOROUGH.—I think there is a fatal variance between them. The declaration repreſents the promiſſory note as containing an abſolute and unqualified promiſe to pay the money. But by the inſtrument produced, the maker only promiſes to pay upon the ſpecific condition that payment is demanded at a particular place. We have lately held, that where the place of payment is mentioned in the body of the note, it forms a material part of the inſtrument. There ſeems to be no doubt, therefore, that it ſhould be ſet out in the declaration.

Plaintiff nonſuited.

Jekyll and *Nolan* for the plaintiff.

Garrow and *Adam* for the defendant.

[Attornies, *Paſmore* and *Fraſer*.]

Vide Saunderſon *v.* Bowes, 14 Eaſt. 500.

AD-

ADJOURNED SITTINGS AT WESTMINSTER.

1812.

Monday, June 22.

CUNNINGHAM q. t. v. WATSON.

An action on 5 Eliz. c. 4. § 31. for ſetting to work a perſon who has not ſerved an apprenticeſhip, cannot be maintained, unleſs the unqualified perſon has worked by the defendant's orders one entire month in the county in which the venue is laid.—Nor is it enough that the defendant gave him orders in this county to work, and that he accordingly did work at the buſineſs above a month in another county.

DEBT on 5 Eliz. c. 4. ſ. 31. for ſetting one *Brookes* to work in the trade of a houſe-painter, he not having ſerved an apprenticeſhip of ſeven years therein.

The defendant is a maſter houſe-painter, reſident in Hanway Yard, in the county of Middleſex. *Brookes*, who had never before been employed as a painter, went into his ſervice in July 1811; he was firſt ſent to do work at the Bank of England, in the City of London, and continued working there till the 3d of September; he then went to work for the defendant at a gentleman's houſe in St. James's Square, where he remained eight or ten days; at the end of that time he returned to the Bank of England, and continued to work there as before till the 27th of December; on the following day, and for above a month afterwards, he was employed by the defendant to aſſiſt in painting the houſe of a gentleman in *Bruton Street*, in the county of *Middleſex*. The declaration was entitled generally of Hilary Term. It appeared that the defendant had given orders in Hanway Yard for *Brookes* to work at the Bank of England.

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CUNNINGHAM q. t. v. WATSON.

Jervis inſiſted, that upon theſe facts the plaintiff muſt be nonſuited, as the defendant had not employed *Brookes* one entire month in the county of Middleſex before the commencement of the action. The words of the ſtatute, "that every perſon willingly offending "or doing the contrary ſhall forfeit and loſe for every "default forty ſhillings for every month," muſt mean, that the default ſhould have continued a month before any penalty was incurred.

Garrow and *Lawes*, contrà, contended, 1ſt, that the ordering of *Brookes* in Hanway Yard to work at the Bank, was an employment of him in Middleſex; and 2dly, that it was not neceſſary, in order to ſupport this action, that *Brookes* ſhould have been employed in Middleſex for one whole month together, but that any employment of him in Middleſex was enough to ſubject the defendant to the penalty, although no more than one penalty of 40*s*. could be incurred in any one month. If a contrary conſtruction were put upon the ſtatute, it might eaſily be evaded, by employing unqualified workmen for periods ſhort of a month in two adjoining counties.—But,

Lord ELLENBOROUGH was of opinion, as to the firſt point, that the work muſt be done in the county in which the venue is laid (*a*); and as to the ſecond, that no penalty is incurred till the employment of the

(*a*) *Vide* Butterfield v. Windle, 4 Eaſt. 385. Pope v. Davies, 2 Taunt. 252.

unqualified

unqualified perſon there has continued one entire month (*b*).

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CUNNINGHAM q. t. v. WATSON.

Accordingly the plaintiff was nonſuited.

Garrow and *Lawes* for the plaintiff.

Jervis for the defendant.

[Attornies, *Chippendale* and *Williams*.]

(*b*) *Vide* Rex v. Barnett, *poſt*.

ADJOURNED SITTINGS IN LONDON.

SIMMONDS v. KNIGHT and Another.

Friday, July 3.

THIS was an action of trover by a bankrupt againſt his aſſignees, for certain deeds and other property taken poſſeſſion of by them under the commiſſion to which he had ſurrendered.

In an action of treſpaſs brought by a bankrupt againſt his aſſignees to try the validity of the commiſſion, although they are not named as aſſignees on the record, if he does not give any notice under Sir S. Romilly's act, 49 G. 3. c. 121. § 10. the commiſſion and the proceedings under it are ſufficient evidence to prove the trading, act of bankruptcy, and petitioning creditor's debt.

No notice having been given under Sir *S. Romilly*'s act, 49 G. 3. c. 121. § 10. that the validity of the commiſſion was diſputed, when the plaintiff had made out a *primâ facie* caſe, the defendants put in the commiſſion of bankrupt, and the proceedings under it, for the purpoſe of proving the trading, petitioning creditor's debt, and act of bankruptcy.

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SIMMONDS v. KNIGHT and ANOTHER.

The plaintiff's counsel insisted that these matters must be proved by strict evidence in the same manner as before the statute passed, because the defendants were not here described as assignees, and they must have known perfectly well that the very object of the action was to dispute the validity of the commission.

Lord ELLENBOROUGH.—The statute says, that "in any action to be brought by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt," unless notice in writing shall be given in the manner therein mentioned. This is an action against the assignees of a bankrupt, and no such notice has been given. Therefore, I am bound to receive the commission and proceedings under it as evidence of the trading, petitioning creditor's debt, and act of bankruptcy. The statute is not confined to cases where the assignees are named as such upon the record, and must apply where, as in this instance, the opposite party knows they make out their title under the commission.

The plaintiff submitted to be nonsuited.

Garrow and *E. Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Bousfield* and *Eyre*.]

Coram

Coram BAYLEY, J.

SIORDET and Another, Executors, &c. *v.* BRODIE. Saturday, July 4.

If the captain of an Eaſt Indiaman dies at the outward port after having contracted to bring home certain paſſengers, and laid in a certain quantity of ſtores for the homeward voyage; and the chief mate ſucceeding to the command brings home theſe and other paſſengers, and provides further ſtores for their ſubſiſtence during the voyage; the captain's repreſentatives are entitled to the paſſage money of the paſſengers with whom he had contracted, and the mate to that of the others;—the repreſentatives being liable to him for the portion of the ſtores laid in by him conſumed by the former claſs of paſſengers, and he being liable to the repreſentatives for the portion of the captain's ſtores conſumed by the latter claſs of paſſengers.

THIS was an action by the executors of an *Eaſt India* captain, who had died in the *Eaſt Indies* before the commencement of the homeward voyage, againſt the chief mate of his ſhip, on whom the command had devolved, to recover the amount of the ſums he had received from the paſſengers brought home in the ſhip, for their paſſage and entertainment during the voyage.

The plaintiffs' counſel at firſt reſted their claim upon the uſage of the trade; but not being able to eſtabliſh this, contended upon general principles that the paſſage money muſt belong to the repreſentatives of the captain.—On the other hand, it was contended that the whole of this money belonged to the defendant, who had the actual command of the ſhip during the voyage.

BAYLEY, J.—If there be no uſage upon the ſubject, I think the law is, that where the captain has contracted to carry paſſengers, and dies, his repreſentatives are entitled to the benefit of the contract, and may maintain an action for the paſſage money. If the mate lays out money in purchaſing ſtores for ſuch paſſengers, he is the agent of the repreſentatives for that purpoſe, and may oblige them to repay him.

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But where, after the death of the captain, the mate contracts to carry paſſengers on the homeward voyage, he is himſelf entitled to the benefit of the contract, and may retain the whole of the paſſage money. If for the entertainment of ſuch paſſengers, he uſes any part of the ſtores laid in by the captain, for ſo much he muſt account to the captain's repreſentatives.

The diſtinctions laid down by the learned judge were acquieſced in on both ſides, and it was referred to an arbitrator to ſettle the account between the parties accordingly.

Garrow and *Richardſon* for the plaintiffs.

Park for the defendant.

[Attornies, *Kaye & Co.* and *Chambers.*]

Monday, July 6.

GRIFFIN *v.* LANGFIELD and WIFE.

If goods are delivered to a carrier by the vendor addreſſed to the purchaſer, while the latter is under the age of 21, but they do not reach him till he has attained that age, infancy is a good defence to an action brought againſt him for the price of the goods.

ACTIONS for goods ſold to the wife *dum ſola*. Plea, infancy.

It was ſworn, that Mrs. *Langfield* came of age the 20th of *September* 1808. She then reſided at *Coventry*. The goods in queſtion were delivered, addreſſed to her, on the 18th of the ſame month, at *Burnley* in *Lancaſhire*, to a carrier, who is three days in travelling from thence to *Coventry*.

Park,

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GRIFFIN v. LANGFIELD and Wife.

Park, for the plaintiff, inſiſted that the cauſe of action was not complete till the 21ſt, when Mrs. *Langfield* was no longer an infant. While the goods were in the cuſtody of the carrier, the plaintiff might have ſtopped them, and when they were delivered into her hands a promiſe accrued to pay for them.

Lord ELLENBOROUGH.—When the goods were delivered to the carrier the property veſted in the defendant, and ſhe might immediately have been ſued for their value. Therefore, if ſhe was under age on the 18th, the action cannot be ſupported.

The Jury diſbelieving the defendants' witneſs, found for the plaintiff.

Park and *Reader* for the plaintiff.

Topping and *Campbell* for the defendants.

[Attornies, *Maſon* and *Hurd*.]

Vide Dutton v. Solomonſon, 3 Boſ. & Pul. 582.

Wednesday, July 8.

STEVENS *v.* ELIZEE.

Notwithstanding the order of the Lord Chancellor that commissions of bankrupt shall be sued out against parties by their real names, if a commission issues against a man by a wrong name, under which he obtains his certificate;—while the commission remains unsuperseded, a plea of bankruptcy to an action brought against him by his right name, will be supported by production of the certificate, and proof that he is really the person against whom the commission issued.

ACTION on bill of exchange. Plea, Bankruptcy.

The bill being proved, the defendant put in a certificate under a commission of bankrupt issued (as he alledged) against him, under the name of *Vincent Tallachon*. He was a *French* emigrant; and he has gone in this country by the name of *Pere Elizèe*; but *Vincent Tallachon* was stated to be his true name, by which he had been known in *France*.

Garrow, for the plaintiff, insisted that this certificate was a mere nullity. By an order of the Lord Chancellor, it was strictly ordered that commissions of bankrupt should issue against persons by their real names, that is to say, the names by which they are known in the world. The defendant, therefore, ought to have been denominated "*Pere Elizèe*," in any commission of bankrupt sued out against him, or "*Pere Elizèe* alias *Vincent Tallachon*." An advertisement to the creditors of *Vincent Tallachon*, conveyed no information to the plaintiff, or any of the other creditors of *Pere Elizèe* in *England*, who never heard of such a person as *Vincent Tallachon* in their lives.

Lord ELLENBOROUGH.—What you state may be a very good ground for applying to the LORD CHANCELLOR to have the commission superseded; but if it

it really did iſſue againſt the defendant, while it remains in force I muſt give effect to the certificate. I ſhall require evidence, however, that he was once called *Vincent Tallachon*, and that he is the individual againſt whom under that name the commiſſion iſſued.

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STEVENS v. ELIZER.

This the defendant was unable to prove, and the plaintiff had a verdict.

Garrow and *Reader* for the plaintiff.

Park and *Andrews* for the defendant.

ANN NATHAN *v.* COHEN and three others.

Wedneſday, July 8.

TRESPASS and falſe impriſonment.

If A. obtains a warrant againſt B. directed to C. and D. as conſtables, and voluntarily aſſiſts them in executing it, to treſpaſs and falſe impriſonment brought by B. againſt the three others, A. as well as C. and D. may plead the general iſſue, and give the ſpecial matter in evidence.

The defendants pleaded the general iſſue, under which they propoſed to give in evidence that the plaintiff having aſſaulted the defendant *Cohen*, he procured a warrant againſt her addreſſed to the three other defendants, who are conſtables of the city of *London*, and that it was by virtue of this they had taken her into cuſtody, *Cohen* having pointed her out.

The plaintiff's counſel denied that this was any defence under the general iſſue to *Cohen*, who obtained the warrant, and though not named in it, voluntarily cauſed the plaintiff to be taken into cuſtody.

Lord

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Lord ELLENBOROUGH.—When *Cohen* pointed out the plaintiff to the other defendants, who are conſtables, though himſelf the proſecutor, I think he was acting *in their aid*, within the meaning of 21 *Jac.* 1. *c.* 12. and he is therefore entitled to the protection of the ſtatute.

Plaintiff nonſuited.

Park and *Comyn* for the plaintiff.

Garrow, Serj. *Lawes*, and *Andrews*, for the defendants.

[Attornies, *Harris* and *Fiſher*.]

Vide 24 Geo. 2. c. 44. 42 Geo. 3. c. 85. and 43 Geo. 3. c. 141.

Thurſday, July 9.

DE BERNALES v. WOOD.

In an action to recover back a depoſit paid on the purchaſe of an eſtate, the vendor not being able to make a good title, if the plaintiff declare ſpecially, and allege as ſpecial damage that he has loſt the uſe of his money; on making out his caſe, he will be entitled to intereſt on the depoſit money from the time the purchaſe ſhould have been completed.

ACTION on an agreement for the ſale of an eſtate, to recover back the depoſit.

The plaintiff declared ſpecially, and alleged, by way of ſpecial damage, that by reaſon of a good title not being made, he had loſt and been deprived of the uſe and benefit of the money he had depoſited according to the conditions of ſale.

It was clearly proved, that the eſtate was incumbered with judgments, ſo that a good title could not be

be made; and the only queſtion was, Whether the plaintiff was entitled to intereſt on the depoſit.

Lord ELLENBOROUGH.—We have lately held, that intereſt is not recoverable on money lent, without ſome evidence of a contract for that purpoſe; but I think the plaintiff here ought to be allowed intereſt as ſpecial damage, from the day when the purchaſe ought to have been completed. He avers in his declaration, that by the defendant's breach of contract he has ſince loſt the uſe of his money; and he has proved that averment. There ſeems to be no reaſon, therefore, why this loſs ſhould not be compenſated to him by the allowance of intereſt on his depoſit.

Verdict accordingly.

Topping and *Scarlett* for the plaintiff.

Garrow and *Richardſon* for the defendant.

[Attornies, *Liverſedge* and *Beardon.*]

See the caſes on this ſubject collected in Calton v. Bragg, 15 Eaſt, 223.

Saturday, July 11.

GREEN and Others, Aſſignees of SOUTHEY a Bankrupt, *v.* AUSTIN.

An action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent againſt the ſheriff, who has ſold his tenant's goods under an execution.

MONEY had and received. Plea, the General Iſſue.

This was an action againſt the late ſheriff of *Surrey*, to recover the ſum of £25., being the amount of a year's rent due to the bankrupt from a tenant, whoſe goods to a greater value the defendant had ſold under a writ of *fieri facias*. And it was contended, that as under 8 *Ann. c.* 14. the ſheriff ought to have paid the landlord a year's rent before ſatisfying the execution, the price of the goods in his hands became money had and received to the landlord's uſe.

Lord ELLENBOROUGH however held, after referring to the ſtatute, that money had and received would not lie, and the proper remedy was a ſpecial action on the caſe againſt the ſheriff for removing the goods from the premiſes under the execution before the year's rent was paid to the landlord.

Plaintiff nonſuited.

Garrow and *Marryat* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Oakley* and *Monney*.]

Vide Rotherey v. Wood, ante 24.

Inſtead of bringing an action, however, the landlord may move the Court that he may be paid by the ſheriff what is due to him out of the money levied. Hinchett v. Kimpſon, 2 Wilſ. 140.

PEARSE

PEARSE *v.* PEMBERTHY and Others.

Monday, July 26.

THIS was an action againſt the makers of a promiſſory note, "payable at *Were, Bruce, and Co.*'s." Being preſented there for payment when due, the anſwer was, "Not ſufficient effects."

In an action againſt the maker of a promiſſory note payable at a banking houſe, it is not neceſſary to prove that he had notice of its diſhonour.

The only point made for the defendants was, that they were entitled to notice of its diſhonour. The place where it was made payable being, according to recent deciſions, a material part of the inſtrument; it exactly reſembled a bill of exchange, the bankers ſtanding in the place of the drawees. Had it been a bill of exchange the defendants were clearly entitled to notice; for they had ſome effects in the hands of *Were, Bruce, and Co.*; and there was the ſame reaſon for their receiving notice, although the form of the inſtrument was different. They might ſuppoſe that the bankers would pay the note, and they ought as early as poſſible to have had the information that it would be neceſſary for them to provide for it themſelves, and that their balance at the banking-houſe remained unappropriated. The neceſſity of notice to the maker of a promiſſory note of its diſhonour, reſults from the determination that his liability does not attach, till payment has been demanded at the place where it is expreſſed to be payable.—But

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PEARCE v. PEMBERTHY and others.

Lord ELLENBOROUGH clearly held, that notice was unneceſſary;—and

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

Burrough and *Campbell* for the defendants.

[Attornies, *Pearce* and *Follett*.]

Vide Callaghan v. Aylett, 2 Campb. 549. Fenton v. Goundry, 13 Eaſt, 459. Saunderſon v. Bowes, 14 Eaſt, 500.

BEVERIDGE *v.* BURGIS.

To excuſe the not giving of regular notice of the diſhonour of a bill of exchange to the indorſer, it is not enough to ſhew that the holder, being ignorant of his reſidence, made inquiries upon the ſubject at the place where the bill was payable.

THIS was an action by the indorſee againſt the indorſer of a bill of exchange.

The plaintiff had given the defendant no notice of its diſhonour till ſeveral months after it became due; the excuſe alleged for this omiſſion was, that the plaintiff was ignorant of the defendant's addreſs, which did not appear upon the bill. But the only evidence adduced to ſhew that he had uſed any diligence to diſcover this was, that he had made inquiries upon the ſubject at a houſe in the *Old Bailey*, where the bill was made payable by the acceptor.

Lord ELLENBOROUGH.—Ignorance of the indorſer's reſidence may excuſe the want of due notice; but the

party must shew that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill, and application might have been made to persons of the same name with the defendant, whose addresses are set down in the directory.

1812.

BEVERIDGE v. BURGH.

Plaintiff nonsuited.

Park and *Nolan* for the plaintiff.

Garrow and *Selwyn* for the defendant.

[Attornies, *Jones* and *Smart*.]

Vide Bateman v. Joseph, 12 East, 433. 2 Campb. 461.

OXFORD CIRCUIT.

SUMMER ASSIZES, 52 GEORGE III.

GLOCESTER.

Coram LE BLANC, J.

1812.
Saturday, July 18.

REX *v.* WALKER.

An indictment against an accessary to a felony, stating that the felony was committed *by a person to the jurors unknown*, cannot be supported if the principal felon was a witness before the grand jury.

THIS was an indictment against the prisoner as accessary before the fact to a larceny. The indictment charged, that *a certain person to the jurors unknown*, feloniously stole, took, and carried away six bushels of wheat of the goods and chattels of one *J. Oliver*, and that the prisoner incited, procured, and hired the said *person unknown* to commit the said felony.

The grand jury had found the bill upon the evidence of *Charles Iles*, who acknowledged that he had stolen the wheat; and it was now proposed to call him as a witness to establish the guilt of the prisoner. But the facts being opened by *Taunton* for the prosecution;—

LE BLANC, J.

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REX v. WALKER.

LE BLANC, J. interpoſed, and directed an acquittal. He ſaid, he conſidered the indictment wrong, in ſtating that the wheat had been ſtolen by *a perſon unknown*; and aſked how the perſon who was the principal felon could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill?

So in an indictment for larceny, though the goods may be laid to be the property of *perſons unknown*, if the owner be really known, ſuch an allegation is improper. In that caſe, the priſoner muſt be diſcharged of the indictment laying the goods to be the property of perſons unknown, and tried upon a new one, for ſtealing the goods of the owner, by name. See 2 Eaſt. P. C. 651. 781.

MONMOUTH.

Coram THOMSON, B.

REX v. JOHN BALDWIN.

Tueſday, July 21.

THIS was an indictment for receiving ſtolen goods, knowing them to have been ſtolen. The indictment ſtated, that the goods had been ſtolen by Iſaac Powell, and that he had been duly convicted of this felony at the Great Seſſions for the county of Brecon.

To ſupport an averment in an indictment for receiving ſtolen goods, that the principal felon had been duly convicted, it is ſufficient to give in evidence the examined copy of a record ſhewing that he was found guilty of the felony before a court of competent juriſdiction, however informal the proceedings may appear, and however erroneous the judgment on the felon.

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An examined copy of the record of Powell's conviction was given in evidence, which concluded in the following manner: "Good and lawful men "of the county aforeſaid, being choſen, charged, "and ſworn to inquire between our Sovereign "Lord the King and the ſaid Iſaac Powell, of the "felony aforeſaid, do upon their oath ſay, that the "ſaid Iſaac Powell is guilty of the felony whereof he "ſtands indicted, and find the value of the ſeveral "goods and chattels ſo feloniouſly ſtolen, taken, and "carried away, to amount to the value of 40s. and "the ſaid Iſaac Powell in mercy, &c."

Hughes, for the priſoner, objected that this record was ſo informal and abſurd, that it could not be conſidered ſufficient to ſupport the averment that Powell had been duly convicted of the felony. From the jury having found the value of the goods, and the Court having adjudged the defendant to be amerced, it might as well be taken to be a record in a civil ſuit.

THOMSON, B.—I never did before hear of a felon being "in mercy." But the judgment is not neceſſary, and may be rejected. The conviction, I conceive, is ſufficient. In the common caſe, where the receiver is tried with the thief, there is no judgment upon the thief before the verdict againſt the receiver. This record is full of errors; but an erroneous attainder of the principal is ſufficient as againſt the acceſſary till reverſed.

The priſoner was found guilty.

Bevan

Bevan and *Moyſey* for the proſecution.

Hughes for the priſoner.

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In *Hyman's caſe*, Kingſton aſſizes 1801, 2 Eaſt. P. C. 782. on a reference to the judges it was determined, that in an indictment againſt a receiver of ſtolen goods, it is ſufficient to ſtate the *conviction* (without the *attainder*) of the principal felon.

SHREWSBURY.

Coram LE BLANC, J.

BECK AND OTHERS *v.* EVANS AND ANOTHER.

ACTION againſt the defendants as common carriers, for negligence in the carriage of a caſk of brandy from London to Shrewſbury.

A notice by carriers that they will not be anſwerable for any goods above the value of 5l. unleſs the value be declared, and a premium paid above the common carriage, does not apply to goods, which from their bulk and appearance, muſt be known to exceed the ſpecified value

This caſk, containing 143 gallons of brandy, was delivered to the defendants in London, and they were aware of its contents. It was booked in the uſual manner, nothing being paid upon it by way of inſurance. When the defendants' waggon in which it was conveyed got near Birmingham, the caſk was obſerved to leak very much. The waggoner, however, never unpacked it till he reached Wellington, in

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Shropſhire,—by which time a conſiderable part of the brandy had run out.

The defence chiefly relied upon was, that a notice in the following form had been put up in the defendants' waggon office:

" Public Notice.

" The proprietors of the London and Salop wag-
" gons give this public notice, that they will not be
" anſwerable for caſes, bank-notes, writings, jewels,
" plate, watches, lace, ſilk, hoſe, wool, muſlins, china,
" glaſs, paintings, or any other goods of what nature
" or kind ſoever, above the value of five pounds, if
" loſt, ſtolen, or damaged, unleſs a ſpecial agreement
" is made, and an adequate premium paid, over and
" above the common carriage; ſuch value to be ſpe-
" cified and entered at the time of the delivery here,
" or to any of their offices or agents in the different
" parts of the kingdom.

" Meſſrs. Barnett & Co.
" Proprietors."

As this notice was expreſsly extended to any goods *of what nature or kind ſoever*, the defendants' counſel contended it muſt neceſſarily apply to *a caſk of brandy*; and as no ſpecial agreement had been made, or premium paid over and above the common carriage for that in queſtion, according to a great number of decided caſes, the defendants could not be anſwerable for the damage it had ſuſtained.—But—

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BECK and others, v. EVANS and another.

LE BLANC, J. declared himſelf of opinion, that the notice muſt be confined to things of the ſame deſcription as *caſh*, *bank-notes*, *jewels*, and *watches*, the value of which could not well be diſcovered unleſs declared by the owner; but that where there were caſks, the contents of which were known, ſo that they muſt evidently be above the value of £5. the notice did not apply.

The plaintiff had a verdict; and in the enſuing term the Court of K. B. refuſed a rule to ſhew cauſe why there ſhould not be a new trial, fully concurring in the opinion delivered by the Learned Judge at Niſi Prius.

Dauncey, *Abbott*, and *Puller*, for the plaintiff.

Jervis and *Campbell* for the defendant.

Vide Clay v. Willan, 1 H. Bl. 298. Izett v. Mountain, 4 Eaſt. 371. Nicholſon v. Willan, 5 Eaſt. 507.

ADJOURNED SITTINGS BEFORE MICHAELMAS TERM, 53 GEO. III.

Friday, Oct. 30.

WACKERBARTH *v.* MASSON.

Where, in a contract for the sale of sugar, there is the following term: "free on board a foreign ship," the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.

THIS was an action for not accepting or paying for sugars bought by the defendant from the plaintiff under the following contract:

"London, 17 Jan. 1812.

"Mr. *Wm. Masson*,

"Bo^t of Mr. *J. H. Wackerbarth*,

"95 Hds. Dble. Loaves, at 78/ Free on board a "foreign ship.—Prompt 2 months—a bill at 2 months "with interest."

At the time of the sale, these sugars were lying in a bonded warehouse for exportation. On the 20th of *March* the defendant sent a letter to the plaintiff, requiring him to weigh off and deliver the sugars, and afterwards demanded an order to have them transferred into his name in the warehouse-keeper's books. The plaintiff refused to do so; but offered to put the sugars on board any ship the defendant should name. The defendant still insisted upon having an order for the delivery of the sugars, and, being unable to procure this, intimated to the plaintiff that he entirely renounced the contract.

It appeared, that when sugars are sold for exportation in this manner, the seller is entitled to a bounty,

which he receives when they are bonded, It is uſual for the purchaſer to name a ſhip, on board of which they are put by the ſeller; but ſometimes the purchaſer, inſtead of exporting them himſelf, wiſhes to ſell them again to another perſon; and in that caſe, upon an order from the ſeller, they are generally transferred in the warehouſe-keeper's books to the name of the purchaſer.

Park for the defendant inſiſted, that the contract had been broken by the plaintiff; he was bound to give an order for the delivery of the goods on the 20th of *March*. The term of putting them free on board a ſhip, was introduced for the benefit of the purchaſer, who might therefore renounce it, and inſiſt upon the commodity being transferred to his name or delivered into his own hands.

Lord ELLENBOROUGH.—The delivery for which the plaintiff undertook was—on board a ſhip to be named by the defendant. He was always ready to deliver the ſugars in this manner, and he offered to do ſo. But the defendant requires a *tertium quid*. Inſtead of naming a ſhip, he demanded to have the ſugars weighed off and delivered into his own hands, or transferred to his own name in the warehouſe-keeper's books. The ſeller might have been expoſed to ſome riſk, or might have loſt ſome advantage by agreeing to this, and he had a right to refuſe, as it was not the mode of delivery for which he had ſtipulated. The defendant is therefore liable for a breach of the contract in afterwards refuſing to accept and pay for the goods.

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WACKERBARTH v. MASSON.

The jury fully concurred in this conſtruction of the contract, and found a verdict for the plaintiff.

Garrow, S. G. and *F. Pollock* for the plaintiff.

Park and *Campbell* for the defendant.

[Attornies, *Lang* and *Sherwood*.]

In *Wetherell* v. *Coape*, tried a few days afterwards in C. P. Lord C. J. Mansfield and a Special Jury put exactly the ſame conſtruction upon a ſimilar contract.

Saturday, Oct. 31.

BELL and Others *v.* HOBSON.

Policy on goods "at and from Gottenburg to any port of the Baltic, beginning the adventure from the loading thereof," but declared to be *in continuation* of other ſpecified policies. Theſe were on the ſame goods "at and from Norfolk in Virginia," where in point of fact the goods were loaded.—Held, that under theſe circumſtances, it was no defence to the underwriters on the firſt mentioned policy, that the goods were not loaded at Gottenburg.

THIS was an action on a policy of inſurance on goods by the *Georgia Planter*, "at and from *Gottenburg* to any port or ports in the *Baltic*," declared to be "in continuation of five policies, one for £1,500. dated 16 *March* 1810; one for £1,600. dated 30 *March* 1810; one for £2,300. dated 11 *April* 1810; one for £500. dated 2 *October* 1809; and one for £1,200. dated 23 *February* 1810."

Theſe five policies were all "at and from *Norfolk* in *Virginia* to a port in the *Baltic*." In the policy on which the action was brought it was ſtated that the adventure on the goods was to begin *from the loading thereof aboard the ſaid ſhip*.

The goods inſured in fact were loaded at *Norfolk* in *Virginia*, and when the ſhip touched at *Gottenburg* no part of them was unloaded there.

Garrow

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BELL and others, v. HODSON.

Garrow, S. G. for the defendant contended, on the authority of *Spitta* v. *Woodman*, 2 *Taunt.* 416, and *Horneyer* v. *Luſhington*, 15 *Eaſt*, 46. that the policy never attached, as the goods had not been loaded at the port where the riſk commenced. The reference here to the other policies could make no difference, for in *Spitta* v. *Woodman* it was found as a fact, that the underwriters knew the goods had been loaded in the port of London.

Lord ELLENBOROUGH.—It was with ſome difficulty I could be brought to concur in the authority of *Spitta* v. *Woodman*. I was ſtrongly inclined to think, the intention of the parties might well be taken to be, merely, that the goods ſhould be in a *loaded ſtate* at the port where the riſk commenced, without neceſſarily being taken on board there. In this caſe, however, I am clearly of opinion, that the words of reference to the other policies completely remove the objection. The effect is the ſame as if the terms of theſe policies had been introduced into that on which the action is brought. *Verba relata ineſſe videntur*. Here it is not merely that the underwriters privately knew the real hiſtory of the voyage; but they are informed of it, or are furniſhed with the means of information, upon the face of the policy which they ſubſcribed. How can they now ſay, we expected the cargo to be loaded at Gottenburg, when they were guilty of great negligence if they did not know that it was loaded at Norfolk in Virginia? I much wiſh, that to prevent theſe diſputes, the words "whereſoever loaded," were introduced into the printed form of the policy of inſurance.

Verdict for plaintiff.

Park,

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BELL and others v. HOBSON.

Park, *Marryat*, and *J. Warren* for the plaintiffs.

Garrow, S. G. and *Scarlett* for the defendant.

[Attornies, *Wadeſon* and *Gatty*.]

Saturday, Oct. 31.

IDLE and Others *v.* THORNTON and Others.

Contract in London for the ſale of tallow from a particular ſhip, on arrival—to be taken from the king's landing ſcale—if it ſhould not arrive on or before a given day, the bargain to be void: The ſhip was wrecked off the coaſt of Scotland; but the cargo was ſaved, and might have been forwarded to the port of London by the given day: The vendors reſold the tallow in Scotland: The purchaſers did not offer them any indemnity if they would bring the tallow to London.—Held, that under theſe circumſtances, the vendors were not anſwerable for the non-delivery of the tallow.

THIS was an action of *aſſumpſit* for a breach of the following contract:

"London, 27th Sept. 1811.

"Bought for Meſſrs. Chriſtopher Idle, Brother, "and Co. of Meſſrs. Stephen Thornton, Brothers, "and Co. 200 caſks firſt ſort yellow candle tallow, "at 68/ per cwt. on arrival. If it ſhould not arrive "on or before the 31ſt Dec. next, the bargain to be "void. To be taken from the king's landing ſcale "with cuſtomary allowances, and the amount to be "paid in caſh in 14 days from finiſhing the delivery, "on deducting 2½ per cent. diſcount. Ex Catherina, "Evers."

The firſt count of the declaration alleged, that the tallow did arrive in a port of Great Britain before the 31ſt Dec. but that the defendants refuſed to deliver it. The ſecond count ſtated, that the tallow having been ſhipped on board the Catherina for the port of London, arrived at a certain place in Scotland on the 4th of November, and might have been conveyed from thence to the ſaid port of London, and have arrived there before the 31ſt December, but that the defendants

dants prevented the tallow from ſo arriving, and refuſed to deliver it to the plaintiffs.

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In point of fact, the Catherina with the tallow on board was wrecked off *Montroſe* on the 4th of November 1811. The greater part of the tallow was ſaved; and it might have been forwarded to London before the 31ſt of December. The defendants did not order it to be ſo forwarded, but afterwards ſold it to a merchant in Leith. The plaintiffs, however, on hearing of the accident, did not offer any indemnity to the defendants if the tallow ſhould be brought to London to be delivered in purſuance of the contract.

Lord ELLENBOROUGH.—I ſee no proof of any breach of this contract. *On arrival* muſt mean—on arrival in the port of London; and if the tallow did not arrive there on or before the 31ſt of December, the bargain was to be void. It never did arrive there. Without any default of the defendants, the ſhip was wrecked off the coaſt of Scotland by the fury of the elements. How then is the bargain to be inforced? Had the defendants prevented the Catherina from arriving in the port of London till after the 31ſt of December, to be ſure they would have been liable. Nothing of this ſort is imputed to them. It is only ſaid they were bound to forward the tallow gathered from the wreck. Without an indemnity I am clearly of opinion they were not; and if an indemnity had been offered, the remedy againſt them would perhaps have been rather equitable than legal. Suppoſe the ſhip had been caſt away on the coaſt of Ireland, or on ſome more diſtant ſhore, if this action be well founded, the

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the defendants would ſtill have been bound to forward the tallow to the port of London, at whatever hazard or expence. In conſtruing ſuch a contract, I muſt conſider that it was the intention of the parties it ſhould be void, unleſs the commodity in the ordinary courſe of trade and navigation arrived at the port of deſtination by the appointed day. Numberleſs diſputes would otherwiſe ariſe as to the reſpective obligations both of vendors and purchaſers.

The plaintiffs were nonſuited, and in the enſuing Term the Court of K. B. refuſed a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide.

Garrow, S. G. and *Marryatt* for the plaintiffs.

Park and *Scarlett* for the defendants.

[Attornies, *Lamb* and *Devon*.]

Vide Boyd v. Siffkin, 2 Campb. 326.

Monday, Nov. 2.

EYRE AND ANOTHER v. GLOVER.

Expected profits may be inſured by an open policy.

THIS was an action on an open policy at and from Riga to Hull, "*on profits*."

The plaintiffs proved that a quantity of hemp was ſhipped on their account at Riga, in the veſſel mentioned in the policy, for Hull,—which, if it had arrived there,

there, would have yielded them a profit of £1,000. but that the ſhip and cargo were loſt in the courſe of the voyage. *Barclay* v. *Couſins*, 2 *Eaſt*. 544. was relied upon, to ſhew that under theſe circumſtances the plaintiffs were entitled to a verdict.

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Garrow, S. G. for the defendant obſerved, that it was a valued policy in *Barclay v. Couſins*, but that no caſe had determined that an open policy on profits is lawful. This could be conſidered nothing but a gambling tranſaction. Had the market fallen, then there would have been no intereſt, and all the premium muſt have been returned. A valued policy aſcertains the intereſt; but an open policy, like this, leaves every thing uncertain.

Lord ELLENBOROUGH.—In a valued policy on goods, the expected profit may be included, the aſſured not being reſtricted in the valuation to the invoice price. This in effect is an inſurance on profit; and what may be inſured jointly with ſomething elſe, may be inſured by a ſeparate policy. The circumſtance of the policy in this caſe being open, does not ſeem to me to make any further difference, than to throw upon the aſſured the burthen of ſhewing the amount of the profit they would have made had the goods arrived. *Certum eſt quod certum reddi poteſt.* The plaintiffs have diſtinctly proved that they had a cargo on board the ſhip, which, had it arrived, would have yielded them a profit of £1,000. They have therefore been damnified to that amount beyond the prime coſt of the goods; and there ſeems no reaſon why they ſhould not be indemnified for this loſs by a policy

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policy of insurance. Whether any profit was to arise did, to a certain degree, depend upon the state of the market; but there was no more gambling in this than in any other mercantile transaction; and when it is once known that a profit would arise upon the goods if they arrived, the insurance (which otherwise would not attach for want of interest) becomes strictly a contract of indemnity.

Verdict for the plaintiffs.

Park and *Scarlett* for the plaintiffs.

Garrow, S. G. and *Richardson* for the defendants.

[Attornies, *Roffer* and *Reardon*.]

Vide Grant v. Parkinson, Park, 354. 6th ed. Knox v. Wood, 1 Campb. 543.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

53 GEORGE III.

SECOND SITTINGS IN TERM AT GUILDHALL.

PIRIE and another, Aſſignees of HAMILTON a Bankrupt *v.* MENNETT.

1812.
Saturday, Nov. 21.

THIS was an action to recover the ſum of £123. 5ſ. for premiums due upon certain policies of inſurance, effected by the defendant as an inſurance-broker, and underwritten by the bankrupt.

In an action by the aſſignees of a bankrupt, it is not ſufficient proof of a ſet-off, that the commiſſioners permitted the defendant to prove the debt propoſed to be ſet off under the commiſſion.

The defence was, that loſſes had happened upon theſe policies before the bankruptcy to a larger amount than the premiums, and that the defendant having had a *del credere* commiſſion, he had a right to ſet off theſe loſſes in the preſent action.

The only evidence tendered to prove the ſet-off was, that the commiſſioners had permitted the defendant to prove

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PIRIE and another, Aſſignees of HAMILTON a Bankrupt v. MENNETT.

prove upon Hamilton's eſtate the ſum of £285. as the amount of the loſſes upon the policies in queſtion.

Scarlett, for the defendant, contended that this was ſufficient under 5 Geo. 2. c. 30. ſ. 28. which enacts, "That where it ſhall appear to the ſaid commiſſioners, "or the major part of them, that there had been "mutual credit given by the bankrupt and any other "perſon, or mutual debts between the bankrupt and "any other perſon, at any time before ſuch perſon "became bankrupt, the ſaid commiſſioners, or the "major part of them, or the aſſignees of ſuch bank-"rupt's eſtate, ſhall ſtate the account between them, "and one debt may be ſet againſt another; and what "ſhall appear to be due on either ſide on the balance "of ſuch account, and on ſetting ſuch debts againſt "one another, and no more, ſhall be claimed or paid "on either ſide reſpectively." Here the commiſſioners had ſtated the account between the bankrupt's eſtate and the defendant, and had adjudged that the latter had a right to claim from the former the ſum of £285. The plaintiffs could therefore only recover what appears to be due on the balance of ſuch account, and on ſetting ſuch debts againſt one another. But the balance being in favour of the defendant, the plaintiffs muſt be non-ſuited.

Lord ELLENBOROUGH.—I cannot receive the proof of the debt as ſufficient evidence of the loſſes. When the commiſſioners permitted the defendant to prove, they can neither be conſidered as having done a binding judicial act, nor as having repreſented the aſſignees, and thus aſſented to the defendant's demand. If it

can be ſhewn that the aſſignees acknowledged that the proof was juſt, it would then be ſufficient evidence againſt them.

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PIRIE and another, Aſſignees of HAMILTON a Bankrupt v. MENNETT.

Verdict for the plaintiffs.

Garrow, S. G. and *Abbott* for the plaintiffs.

Scarlett for the defendant.

[Attornies, *Wild* and *Blunt*.]

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

COLLOTT AND OTHERS *v.* HAIGH.

Monday, Nov. 30.

THIS was an action on a bill of exchange, drawn by the defendant upon *J. Duſton*, accepted by him, and indorſed to the plaintiffs.

The drawer of an accommodation bill is not diſcharged by time being given to the acceptor.

It appeared that when the bill became due, the plaintiffs gave time for ſome weeks to *Duſton*, upon his lodging ſome ſecurity in their hands, which did not turn out to be available; but it was likewiſe proved that *Duſton* had accepted the bill merely for the defendant's accommodation, without any conſideration whatſoever.

COLLETT and others v. HAIGH.

Lord ELLENBOROUGH ruled, that under these circumstances the defendant was not discharged by the time given to the acceptor. The drawer of an accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonour of a bill must in general be given to the drawer is, that he may recoup himself by withdrawing his effects from the hands of the acceptor; and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor may thus be materially affected. But where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay. He therefore suffers no injury either by want of notice, or by time being given to the acceptor; and in an action on the bill he cannot defend himself upon either of these grounds.

Verdict for the plaintiff.

Park and *Bolland* for the plaintiff.

Garrow, S. G. for the defendant.

[Attornies, *Farlow* and *Stratton*.]

Vide Laxton v. Peat, 2 Campb. 185.

CURRIE *v.* CHILD, PRITCHARD, AND BROWN.

Wednesday, Dec. 2.

ACTION againſt the defendants, as makers of a promiſſory note. *Child* pleaded his bankruptcy, and the two others the general iſſue.—The note being proved,—

Where, in an action againſt two defendants, one pleads his bankruptcy, and the other the general iſſue, the former, cannot, on proof of his certificate, be made a witneſs for the latter.

Jervis, for the defendants, put in *Child*'s certificate allowed by the Lord Chancellor; and propoſed that a verdict in his favour ſhould be recorded, and that he ſhould then be called as a witneſs for the other two, to prove that the note had been altered in a material part after it was negotiated.—But—

Lord ELLENBOROUGH refuſed to permit this courſe to be purſued, and the jury found a verdict for the plaintiff againſt *Pritchard* and *Brown*, and in favour of the defendant *Child* at the ſame time (*a*).

Where an attesting witneſs becomes inſane, the inſtrument may be proved by evidence of his hand-writing.

In this caſe the note was atteſted by a perſon who has ſince become inſane; and on proof of his inſanity, Lord ELLENBOROUGH held, that evidence of his hand-writing was ſufficient to prove the making of the note (*b*).

Park and *Raine* for the Plaintiff.

Jervis and *Tindal* for the Defendants.

[Attornies, *Rigg* and *Goodchild*.]

(*a*) *Vide* Chapman *v.* Graves, 2 Campb. 333. n.

(*b*) *Vide* Adams *v.* Ker, 1 Boſ. & Pul. 360. Cunliffe *v.* Sefton, 2 Eaſt 183.

Thurſday, Dec. 3.

WARD *v.* SCOTT.

Where a ſtatute points out the particular manner in which a canal company ſhall ſell and convey lands, and enacts that every ſuch ſale and conveyance ſhall be valid and effectual to all intents and purpoſes, this does not cure any defect in the title to lands ſo ſold and conveyed by the company.

THIS was an action for money had and received againſt an auctioneer, to recover the ſum of £98. being the amount of a depoſit paid him by the plaintiff on the purchaſe of a piece of land near Paddington, from the Grand Junction Canal Company.

The abſtract handed over to the plaintiff began only in the year 1800, with a conveyance of the premiſes to the Grand Junction Canal Company, encumbered by a mortgage for £500.; and it was allowed that as between two individuals, the title would have been defective. But it was contended, that this was cured by the acts for eſtabliſhing and regulating the Grand Junction Canal Company. Stat. 33 Geo. 3. c. 80. authorizes the Company to buy land for the making of the canal, and to reſell ſuch parts as are not uſed for that purpoſe, and declares that "ſuch ſales, conveyances, and aſſurances, ſhall be valid and effectual in law, to all intents and purpoſes whatſoever, any law, ſtatute, uſage, or cuſtom to the contrary in anywiſe notwithſtanding." And ſtat. 34 Geo. 3. c. 24. after preſcribing the mode in which the company ſhall ſell and convey to a purchaſer, enacts, that every ſuch ſale and conveyance ſhall be valid and effectual.

Garrow, S. G. for the defendant inſiſted, that as the piece of land in queſtion had been bought and ſold by the Grand Junction Canal Company, according to the proviſions

provisions of these acts, *the sale was valid and effectual*, and the title could not be objected to.

Park, *contrà*, observed, that according to this doctrine, all the defective or wrongful titles in England might be completely cured by being drawn through the Grand Junction Canal.

Lord ELLENBOROUGH.—I must suppose that the words in the statutes relied upon refer only to the mode in which the conveyances are made, without having any operation upon the title to the subject-matter conveyed. A contrary construction would be alarming to every landholder in the kingdom.

The plaintiff had a verdict.

Park, *Topping*, and *Nolan* for the plaintiff.

Garrow, S. G. and *Fell* for the defendant.

[Attornies, *Rigg* and *Sale*.]

JONES *v.* EDNEY.

Friday, Dec. 4.

MONEY had and received, to recover back the sum of £105. paid as a deposit upon the purchase of the lease of a public house called the GENERAL ABERCROMBIE.

In the conditions of sale of the lease of a public house, it was described as "a free public house:" the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer: this lease was all read over by the auctioneer at the time of the sale, who said mistakenly that it was *a free public house*, and that the covenant about the beer had been decided to be bad.—*Held*, that a purchaser who heard the lease read over, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit.

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In the conditions of ſale this was deſcribed as "*a free public houſe*," that is to ſay, that the tenant was not bound by the terms of the leaſe to take his beer from any particular brewer. The leaſe in fact contained a proviſo, that the leſſee and his aſſigns ſhould take all their beer from the brewery of *Elliott & Co.* or pay a very high advanced rent. At the ſale the auctioneer read over the whole leaſe in the hearing of the bidders. When he came to the clauſe about taking the beer, he was aſked, How the houſe could be called "a free public houſe?" He anſwered, "That clauſe has been done away with. There has "been a trial upon it before Lord Ellenborough (*a*), "who

(*a*) The caſe alluded to, was *Cooper* v. *Twibill*, tried before Lord ELLENBOROUGH at the Weſtminſter Sittings after Trinity Term 1808.

Replevin for taking the plaintiff's goods in *the General Abercrombie public houſe*. Avowry for arrears of an advanced rent, on account of the plaintiff not having purchaſed the beer ſold in his houſe from *Meſſrs. Elliott and Call*. Plea in bar, that *Meſſrs. Elliott & Call* delivered to the plaintiff bad, nauſeous, and unwholeſome beer, to be ſold by him in his public houſe, by reaſon whereof he loſt divers cuſtomers; that he required *Meſſrs. Elliott & Call* to take back the bad beer and ſend him ſome which was good, but they refuſed to do ſo; and thereupon, and not before, for the neceſſary ſupply of his cuſtomers, he purchaſed beer from other perſons. Replication, *de injuria ſua propria abſque tali cauſâ*.

Lord ELLENBOROUGH ſaid, in ſummoning up to the jury, "I hope this is the laſt time I ſhall ſee ſuch a proviſion in any leaſe; for it is too much that any man ſhould by his own act, without the intervention of a court, be enabled to proceed in a ſummary way, and to diſtrain *gravi manu* for that which is a penalty. The whole of theſe leaſes by which people of the deſcription of the plaintiff are prevented from having the article

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"who has decided it to be bad. I warrant it as a free "public houſe, and ſell it as ſuch." The plaintiff was the higheſt bidder, and paid 100 guineas depoſit; but finding that the clauſe might ſtill be enforced, he refuſed to complete the purchaſe, and inſiſted on being paid back the depoſit.

Garrow, S. G., for the defendant, contended, that the action could not be maintained, as the plaintiff heard the whole leaſe read over, and could neither complain of concealment nor deception. He had an opportunity of judging for himſelf reſpecting the operation of the objectionable clauſe, or of taking the opinion of his profeſſional adviſer. The auctioneer was certainly miſtaken as to the effect of Lord Ellenborough's deciſion in the caſe of *Cooper* v. *Twibill*, but in giving an opinion upon that ſubject he could not be conſidered as acting in his capacity of auctioneer, and his miſtake could not vitiate the ſale.

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article they deal in from thoſe who will ſerve them beſt, are extremely injurious to the public intereſt and welfare. However, no man is bound to make himſelf a ſacrifice to ſuch a covenant as this. On the contrary, it is his duty in reſpect to the public health, to reſiſt it. If the plaintiff had gone on ſelling beer of a bad quality, with notice to him that it was ſo, and any material injury had been produced to any of his majeſty's ſubjects by drinking it, he would clearly have been liable to all the conſequences of a criminal proſecution for ſelling beer of ſo noxious a quality. It was therefore no more than what was due to himſelf, for his own indemnification, that he ſhould apply for beer elſewhere, if he was ill ſerved by his own landlord.

The plaintiff had a verdict.

Vide Holcombe v. Hewſon, 2 Campb. 391.

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Lord ELLENBOROUGH.—In the conditions of ſale this is ſtated to be "a free public houſe." Had the auctioneer afterwards verbally contradicted this, I ſhould have paid very little attention to what he ſaid from his pulpit. Men cannot tell what contracts they enter into, if the written conditions of ſale are to be controuled by the babble of the auction room. But here the auctioneer at the time of the ſale declared that he warranted and ſold this as a free public houſe. Under theſe circumſtances a bidder was not bound to attend to the clauſes of the leaſe or to conſider their legal operation (*b*).

Verdict for the plaintiff.

Park, *Topping*, and *E. Lawes*, for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Caſtle* and *Wiltſhire*.]

(*b*) *Vide* Gunnis *v.* Erhart, 1 H. Bl. 289.

Monday, Dec. 7.

PRICE *v.* LITTLEWOOD.

In an action for diſturbing plaintiff's enjoyment of a pew claimed in right of a meſſuage, an old entry in the veſtry book, ſigned by the churchwardens, ſtating that the pew had been repaired by the then owner of the meſſuage, (under whom plaintiff claims) in conſideration of his uſing it, is admiſſible evidence to prove plaintiff's right to the pew.

THIS was an action on the caſe for diſturbing the plaintiff's enjoyment of a pew or gallery in the church of *Hendon*, which he claimed in right of a houſe occupied by him in that pariſh.

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The plaintiff deduced his title to this houſe from *Sir William Rawlinſon*, to whom it belonged in the year 1691, and offered in evidence an entry in the veſtry-book, dated 8th October in that year, ſigned by the then churchwardens, ſtating that the pariſh church had been new leaded and repaired at the coſts and charges of the pariſh, except the aiſles over the two galleries, the one belonging to *Sir William Rawlinſon*, and the other to *John Nicholls Eſquire*, which were leaded and repaired at the coſts and charges of the ſaid *Sir William Rawlinſon* and *John Nicholls*, in conſideration of their uſing the ſaid galleries.

Garrow, S. G. contended that this entry could not be evidence againſt the defendant.

Lord ELLENBOROUGH.—I think the entry is evidence in ſupport of the plaintiff's claim. It ſhews the reputation of the pariſh upon the right; and, beſides, it is made by the churchwardens upon a ſubject within the ſcope of their official authority.

The plaintiff proved, that as far back as could be traced, the pew had been uſed by the occupiers of the houſe in queſtion, and the jury found a verdict in his favour.

Topping, *Marryat*, and *F. Pollock*, for the plaintiff.

Garrow, S. G. and *Abbott*, for the defendant.

[Attornies, *Pitches* and *Neeld*.]

Vide Stocks *v.* Booth, 1 T. R. 428. Griffith *v.* Matthews, 5 T. R. 296.

ADJOURNED SITTINGS IN LONDON.

Friday, Dec. 11.

DICKMAN *v.* BENSON.

Stat. 2 Geo. 2. c. 36. requiring articles to be entered into between the maſters of ſhips and the mariners, and providing that the mariners ſhall not fail in any ſuit for wages from not producing the articles, does not apply to the caſe of a Britiſh ſeaman entering on board a foreign ſhip in a Britiſh port.

THIS was an action for wages earned by the plaintiff as a ſeaman on board an American ſhip, in a voyage from London to St. Peterſburgh and back.

In the courſe of the trial it became material to determine, whether ſtat. 2 Geo. 2. c. 36. which requires articles to be entered into between the maſters of ſhips and the mariners in all foreign voyages, and provides, that the mariners ſhall not fail in any ſuit for the recovery of wages for want of the production of theſe articles, applies to the caſe of a Britiſh ſeaman entering on board a foreign ſhip in a Britiſh port.

Lord ELLENBOROUGH, after referring to the ſtatute, ſaid, he was of opinion, both from its language and its policy, that it was confined to voyages on board of Britiſh ſhips, and that its proviſions did not apply to a caſe like the preſent.

The plaintiff had a verdict.

Lawes and *E. Lawes* for the plaintiff.

Garrow, S. G. for the defendant.

[Attornies, *Theakſton* and *Weſt*.]

SIMPSON

SIMPSON AND ANOTHER *v.* SWAN.

Friday, Dec. 11.

THIS was an action for money had and received to recover the ſum of £210.

Where a factor upon ſelling goods takes a ſecurity payable to himſelf from the purchaſer, and gives his own ſecurity to the principal for the net proceeds, without diſcloſing the name of the purchaſer; if the latter becomes inſolvent before paying his ſecurity, the factor cannot compel the principal to refund the money received by him as the price of the goods.

Money had and received will not lie where the plaintiff upon the ſame tranſaction would be liable to a croſs action to recover damages to an equal amount.

The defendant, a leather manufacturer at Edinburgh, employed the plaintiffs as his factors in London, to diſpoſe of goods which he conſigned to them. Their courſe was, to ſell theſe goods for a commiſſion of two and a half per cent. When they ſtand *del credere*, they have a commiſſion of four or five per cent. Having ſold the defendant's goods, they uſually took bills of exchange at four months from the purchaſers. They then remitted to the defendant their own promiſſory notes for the net proceeds, falling due a day or two later than the bills of exchange. They never informed the defendant who the purchaſers were, or that any ſecurities were taken from them. The parcel of goods in queſtion were received by the plaintiffs on the 8th of October, and on the 12th of December ſold for £218. to one *Beckwith*, who then accepted a bill for the amount, payable to the plaintiffs at four months after date. On the following day the plaintiffs ſent the defendant an account ſales, merely mentioning the price for which the goods were ſold, and the deduction for commiſſion and charges, and incloſed their promiſſory note for the net proceeds, which came to £210. On the 9th of March following *Beckwith* ſtopped payment, and then, for the firſt time, the plaintiffs informed the defendant that he was the

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the purchaſer of the goods, and that the defendant muſt conſider him as his debtor. They likewiſe requeſted that the defendant would return their promiſſory note cancelled, or remit them money to take it up. The defendant had negotiated the note, and when it became due it was paid by the plaintiffs out of their own funds. They now attempted to prove that this tranſaction was conducted according to the general uſage of the leather trade, and that according to that uſage, where the purchaſer fails after giving a bill of exchange for the price of the goods, the loſs falls upon the principal, although he has previouſly obtained a ſecurity from the factor for the amount. But it turned out that the uſage is various with regard to the mode of ſelling, and the only inſtances eſtabliſhed of the principal refunding upon the failure of the purchaſer were, where the factor had granted acceptances upon the goods before the ſale. The witneſſes likewiſe ſtated, that *Beckwith* was generally conſidered to be in inſolvent circumſtances at the time the goods in queſtion were ſold to him.

Lord ELLENBOROUGH.—If there had been an univerſal uſage of trade, that under theſe circumſtances the principal muſt refund to the factor and ſubmit to the loſs, it would have marked the contract between theſe parties. But the uſage altogether fails, and we are left to the reaſon of the thing. If the principal draws before the ſale, it is very reaſonable that he ſhould repay the money when the conſideration fails on which the factor granted the acceptance. There the principal is deprived of no information, and is led into no error. But where, after the ſale the factor,

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tor, without mentioning to whom he has ſold, or what ſecurity he has taken, remits a bill of exchange or promiſſory note for the net proceeds, this naturally ſeems to cloſe the tranſaction, and completely lulls the ſuſpicion of the principal. He has no means of reſorting to the purchaſer, or of exerciſing his judgment as to the proper mode of ſecuring payment. He has the beſt ground to ſuppoſe that the factor has actually been paid, or is contented to take upon himſelf the reſponſibility of the purchaſer. If this tranſaction can be unravelled, every man who receives a bill for his balance may be called upon at any diſtance of time to refund. But when a bill is given in this way, it muſt operate as a final ſettlement between the parties.—There is ſtill another objection to the plaintiffs recovery. This is an action for money had and received, which is an equitable action, and it ought not to ſucceed, unleſs the plaintiff's claim be founded in equity and good conſcience. But it would be unjuſt and unconſcientious to throw this loſs upon the defendant, if it aroſe from the negligence or miſconduct of the plaintiffs themſelves; and we have had it proved that *Beckwith*, to whom theſe goods were ſold, was notoriouſly in inſolvent circumſtances at the time of the ſale. Upon that evidence, the plaintiffs would be liable to an action for ſelling the goods to him; and on that ground likewiſe, they cannot be permitted to recover back the money they paid upon their promiſſory note, which they might be compelled to repay in the ſhape of damages.

Plaintiffs nonſuited.

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Garrow, S. G. *Topping*, and *Eſpinaſſe*, for the plaintiffs.

Park, *Scarlett*, and *Adam*, for the defendant.

[Attornies, *Humphreys* and *Fraſer*.]

Vide Edgar v. Bumpſtead, 1 Campb. 411. Jameſon v. Swainſon, 2 Campb. 546. n.

Saturday, Dec. 12.

FOWLER AND WIFE v. HOMER.

An action for defamation cannot be maintained againſt a man whoſe property has been ſtolen, and who upon reaſonable grounds of ſuſpicion charges an innocent perſon with having ſtolen it.

THIS was an action for defamation. Plea, *the general iſſue.*

The defendant is a haberdaſher. On a Saturday evening, while he was abſent, *Mrs. Fowler* came into his ſhop and bought ſome goods. Soon after ſhe was gone, his ſhopman miſſed a roll of ribband, and miſtakenly ſuppoſed that ſhe had ſtolen it, but did not then purſue her. On the following Monday, as ſhe was again paſſing the ſhop, the ſhopman pointed her out to the defendant as the perſon who had ſtolen the ribband. The defendant brought her into the ſhop, and accuſed her of the robbery, which ſhe poſitively denied. He then carried her into an adjoining room, and ſent for her father, to whom he repeated the accuſation: After a good deal of altercation, ſhe was allowed to go home, and there the matter reſted.

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FOWLER and WIFE v. HOMER.

Lord ELLENBOROUGH.—I am clearly of opinion that this action cannot be maintained. There appears to be no malice on the part of the defendant. I ſuppoſe this lady to be completely innocent of the offence laid to her charge; but ſhe has not been wantonly or maliciouſly calumniated. When a ſervant repreſents to a maſter that his goods have been ſtolen by a particular individual, it is juſtifiable for the maſter, with a view to inquiry, to tax that individual with the theft; and although the ſuſpicion turns out to be erroneous, the law gives no redreſs to the party accuſed. The accuſation, though unfounded, was not malicious. No doubt it may prove very detrimental to the object of it; but this is one of many inſtances, where there being a loſs without an injury, the ſufferer muſt conſider himſelf not wronged but unfortunate. If the defendant had continued to propagate the ſtory to ſtrangers, that would have furniſhed evidence of malice; but if he could not lawfully charge the perſon ſuſpected on reaſonable grounds, though innocently, of having committed the theft, it would be quite impoſſible for a man who is robbed to inquire with any ſafety after the ſtolen goods. From ſitting in another place, I know that the ſhopkeepers of this town are ſubject to the moſt enormous pillage, and they muſt have an opportunity of protecting their property, and bringing offenders to juſtice.

This expoſition of the law was acquieſced in by the plaintiffs' counſel; but an inſtance was pointed out in which the defendant had rather tranſgreſſed the line of inveſtigation above laid down, whereupon the parties agreed to withdraw a juror.

Garrow

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FOWLER and WIFE v. HOMER.

Garrow, S. G. and *Comyn* for the plaintiffs.

Topping and *J. Williams* for the defendant.

[Attornies, *Pitman* and *Baxter*.]

Vide M'Dougall v. Clardidge, 1 Campb. 267. and the authorities there referred to.

But although a peace officer may, a private perſon cannot, juſtify *an arreſt* on a ſuſpicion of felony, without a warrant, if the party ſuſpected of the charge prove innocent. Samuel v. Payne, Doug. 358. Adams v. Moore, Selw. N. P. 830.

Saturday, Dec. 12.

DENT v. DUNN, Executrix, &c.

The maker of a promiſſory note pays money into the hands of an agent to retire it: the agent tenders the money to the holder of the note, on condition of having it delivered up: the note being miſlaid, this condition is not complied with; and the agent afterwards becomes bankrupt with the money in his hands.—*Held*, that the maker was ſtill reſponſible on the note; but that intereſt was not recoverable after the time of the tender.

THIS was an action on two promiſſory notes made by the teſtator.

It appeared that in the year 1805, after his death, the defendant gave her agent a ſum of money for the purpoſe of taking them up. The agent went to the plaintiff, and offered to pay him the principal and intereſt, on having the notes delivered to him. The plaintiff having then miſlaid them, could not comply with this condition. The agent afterwards failed, with the money in his hands. The notes were not diſcovered till a ſhort time before the commencement of this action.

Burrough,

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Burrough, for the defendant, inſiſted, that under theſe circumſtances the action could not be maintained. The plaintiff had made the holder of the money his agent, and ought to bear the loſs. The ſum paid for the purpoſe of taking up the notes might have been recovered from the agent by the plaintiff as money had and received to his uſe.

Lord ELLENBOROUGH.—This was only a tender of payment, which could not extinguiſh the debt. The money in the hands of the agent was not to become the plaintiff's till the condition of producing the notes was complied with. The holder of the money at the time of his failure ſtill continued the agent of the defendant. No credit had been given to him by the plaintiff.

A queſtion then aroſe, as to what intereſt the plaintiff was entitled to recover.

Lord ELLENBOROUGH.—I think intereſt ought to ſtop from the offer to pay. Intereſt, properly ſpeaking, is a compenſation agreed to be paid for the uſe of money forborne by the lender at the borrower's requeſt. It is more frequently recovered in the ſhape of damages for money improperly retained by the debtor contrary to the requeſt of the creditor. But in neither of theſe ways can intereſt continue to run after an offer to pay the principal, upon a reaſonable condition, which the party to receive it refuſes or is not in a ſituation to fulfil.

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DENT v. DUNN, Executrix, &c.

Verdict for the principal and intereſt down to the tender.

Garrow, S. G. and *Littledale*, for the plaintiff.

Burrough for the defendant.

[Attornies, *Hicks* and *Exley*.]

Vide Calton v. Bragg, 15 East 223.

Tueſday, Dec. 15.

TUOWELL *v.* HEYMAN and Another, Executrix and Executor, &c.

If executors neglect to give orders for the funeral of the teſtator, and have ſufficient aſſets for that purpoſe, they are liable, upon an implied promiſe, to the perſon who furniſhes the funeral in a manner ſuitable to the teſtator's degree and circumſtances.

IN this action the defendants were ſued as executors for the funeral expences of the teſtator, who left conſiderable property behind him. They pleaded merely *the General Iſſue*.

The reaſonableneſs of the plaintiff's bill was not denied; but it appeared that the defendants had given no orders whatever reſpecting the funeral. The queſtion therefore aroſe, whether under theſe circumſtances they were liable upon an implied promiſe to the plaintiff.

Lord ELLENBOROUGH.—I think the defendants are liable in this action. It is allowed that the funeral was conducted in a manner ſuitable to the teſtator's degree and circumſtances, and that the plaintiff's charge is fair and reaſonable. The defendants do not deny that

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they have affets. Then will not the law imply a promife on their part to fatisfy this demand? It was their duty to fee that the deceafed was decently interred; and the law allows them to defray the reafonable expence of doing fo before all other debts and charges. It is not pretended that they ordered any one elfe to furnifh the funeral, and the dead body could not remain on the furface of the earth. It became neceffary that fome one fhould fee it configned to the grave; and I think the executors, having fufficient affets, are liable for the expence thus incurred.

Verdict for the plaintiff.

Topping and *Lawes* for the plaintiff.

Garrow, S. G. and *Park*, for the defendant.

[Attornies, *Willoughby* and *Hartley*.]

In cafe of neceffity, a ftranger may direct the funeral, and defray the expence out of the deceafed's effects, without rendering himfelf liable as executor de fon tort. Vin. Abr. executor. B. a. 24.

EMANUEL v. DANE.

Thurfday, Dec. 17.

TROVER for a watch.

The plaintiff exchanged a watch with the defendant for a pair of candleflicks, which the latter warranted to be filver.

The plaintiff's cafe was, that he had exchanged this watch with the defendant for a pair of candleflicks, filver.—*Held*, that the plaintiff could not maintain trover for the watch, on proof that the candleflicks were of bafe metal.

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warranted to be silver, which turned out to be of base metal; and that the defendant, on the candlesticks being returned to him, had refused to deliver up the watch.

Park, for the defendant, objected, that under these circumstances, trover was not maintainable.

Topping, contrà, insisted that the property in the watch could not be transferred to the defendant by the fraud which he had practised.

Lord ELLENBOROUGH.—Shew me that the defendant entered into a conspiracy to cheat the plaintiff in this transaction, and perhaps you may rescind the contract entirely on account of the gross fraud committed by one of the contracting parties. But unless the contract be rescinded, this action cannot be maintained. The watch remains the property of the defendant, though the plaintiff be entitled to a compensation in damages for a breach of the warranty that the candlesticks were of silver. I cannot try a question of warranty in an action of trover.

Plaintiff nonsuited.

Topping and *Andrews* for the plaintiff.

Park and *Comyn* for the defendant.

[Attornies, *Isaacs* and *Randall*.]

Vide Weston v. Downes, Doug. 23. Towers v. Barrett, 1 T. R. 133. Lewis v. Cosgrave, 2 Taunt. 2.

CARSTAIRS

CARSTAIRS and others, Assignees of KENSINGTON and Co. Bankrupts, *v.* BATES. Friday, Dec. 18.

THIS was an action against the defendant, as acceptor of a bill of exchange for £230. dated 13th July 1812, drawn by *J. Allport*, payable to his own order, at two months after date, and indorsed by him to the bankrupts.

Where bankers discount a bill of exchange for a customer, giving him credit for the amount of the bill, and debiting him with the discount, the bill becomes the property of the bankers; and upon their bankruptcy, their assignees may maintain an action upon it, although there be no balance due to them from the customer.

Allport the drawer kept cash with *Kensington and Co.* the bankers. On the 17th of July they discounted for him this bill and two others,—one for £50. and another for £80. They credited him with the amount of the three bills, and debited him with the discount; so that, deducting the discount, they were placed to his account as cash, which he might immediately have drawn out. There was then a balance due to him of three or four hundred pounds, and his account remained *good* till the banking-house stopped payment. This happened on the 21st of July, and the commission of bankrupt was sued out the following day.

Park, for the defendant, insisted that the action could not be maintained, as the bill of exchange under these circumstances remained the property of *Allport*; and he relied upon *Giles v. Perkins*, 9 East, 12. in which it was held, that a customer paying bills not due into his bankers in the country, who credited their customers for the amount of such bills if ap-

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proved as caſh (charging intereſt), was entitled to recover back ſuch bills in ſpecie upon the bankers becoming bankrupt, the balance of his caſh account, independent of ſuch bills, being in his favour at the time of the bankruptcy: There, Lord ELLENBOROUGH ſaid, "Every man who pays bills not then "due into the hands of his banker, places them there "as in the hands of his agent, to obtain payment of "them when due."

Lord ELLENBOROUGH.—Is it meant ſeriouſly to conteſt the right of the aſſignees to recover in this action? The bankers were the purchaſers of this bill. They did not receive it as the agents of *Allport*. The whole property and intereſt in the bill veſted in themſelves, and they ſtood all riſks from the moment of the diſcount. If the bill had been afterwards ſtolen or burnt, theirs would have been the loſs. In *Giles v. Perkins* the bankers were mere depoſitaries, with a lien when the account was overdrawn. The cuſtomer there drew upon the credit of the bills depoſited. Here *Allport* might have drawn out the amount of the bill, deducting the diſcount, as actual caſh, in the ſame manner as if he had diſcounted the bill with a third perſon, and then paid in the amount in bank-notes. The diſcount makes the bankers complete purchaſers of the bill; the tranſaction was completed; they had no lien, but the thing itſelf; the bill was as much theirs as any chattel they poſſeſſed. This very diſtinction was taken in the caſe cited; for it was there ſaid, "If the banker diſcount the bill, or "advance money upon the credit of it, that alters the caſe;

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" case; he then acquires the entire property in it, or " has a lien on it pro tanto for his advance."

Verdict for the plaintiff.

Garrow, S. G. and *Abbott*, for the plaintiff.

Park for the defendant.

[Attornies, *Dennetts* and *Stratton*.]

Vide Bent v. Puller, 5 T. R. 494. Bolton v. Puller, 1 Bos. & Pull. 539. Parke v. Eleason, 1 East. 544. Collins v. Martin, 1 Bos. & Pul. 649.

HOURIET AND ANOTHER *v.* MORRIS.

Friday, Dec. 18.

An action may be maintained here by a neutral on promissory notes given to him by a British subject in an enemy's country for goods sold there.

THIS was an action by the payees against the maker of several promissory notes, dated at Paris, 26th May 1810, for 5,000 *livres tournois* value received in merchandize.

The plaintiffs have long been manufacturers of watches at *Locle*, near *Neufchatel*, in Switzerland. Their custom has been to go once a year to Paris, and to reside about a month in that metropolis, for the purpose of disposing of their commodities. Being there on their annual visit in May 1810, they sold watches to the defendant, a British subject, for the value of which the notes in question were given.

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HOURIET and another v. MORRIS.

Garrow, S. G. for the defendant, inſiſted that under theſe circumſtances the action could not be maintained. Here was a trading in an enemy's country, and no contract ariſing out of it could be enforced in our courts of juſtice.

Lord ELLENBOROUGH.—The contracting parties were not alien enemies, and it does not follow that the contract was void, though made in an enemy's country. The plaintiffs, who are domiciled in Swiſſerland, might lawfully ſell their goods in Paris, and it is not proved that the defendant, who is a Britiſh ſubject, purchaſed them there for any illegal purpoſe.

In an action on a promiſſory note made and dated in a foreign country, the declaration, without noticing that circumſtance, may allege that it was made in the county in which the venue is laid.

Campbell, on the ſame ſide, then objected that there was a fatal variance, the declaration having ſtated that the notes were made in *London*, whereas in fact they appeared on the face of them to have been made at *Paris*. In declaring in foreign bills, the conſtant courſe is, to ſtate that they were drawn at the place where they bear date, adding the venue under a videlicet (*a*); and in *Robert v. Harnage*, 2 Ld. R. 1043. 6 Mod. 228. S. C. it was held fatal to ſtate that a bond, dated at Fort St. David's in the Eaſt Indies, was made in London, and that the declaration ſhould have alleged that the defendant, "*apud Fort St. David's in* "*the Eaſt Indies, viz. apud London in parochia Beatæ* "*Mariæ de Arcubus, &c. per ſcriptum, &c.*"

Lord ELLENBOROUGH.—The contract evidenced by a promiſſory note is tranſitory, and the place where

(*a*.) Bayley on Bills 175.—3d ed.

it

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it purports to be made is immaterial. I see no reason why you may not state that the note was made in the parish of St. Mary-le-Bow, in the ward of Cheap, though dated a Paris,—in the same manner as if it had been dated at York.

Verdict for the plaintiff, according to the rate of exchange at the commencement of the action.

Topping and *Du Bois*, for the plaintiff.

Garrow, S. G. and *Campbell*, for the defendant.

[Attornies, *Gregson* & Co. and *Hurd*.]

Promissory notes made abroad do not seem entitled to the aid of 3 & 4 Ann. c. 9. See Carr v. Shaw, Bayley on Bills, 18. n.

PRITT and Others *v.* FAIRCLOUGH and Others. Friday, Dec. 18.

THIS was an action for not accounting for goods sent out by the plaintiffs from London, to be sold on commission by the defendants in the West Indies.

Where the defendants had acknowledged they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial;—*held*, that an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was admissible evidence of the contents of the letter, on proof that according to the plaintiff's course of business the letters which he wrote were copied by this clerk, and then sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct.

A notice was served upon the defendants to produce all the letters written to them by the plaintiffs; and a letter was given in evidence, written to the plaintiffs by the defendants, in which they acknowledge the

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receipt of a letter from the plaintiffs, dated 18th December 1807. This letter, which was alleged to contain a copy of the invoice of the goods, together with directions for selling them, being called for, was not produced.

The plaintiffs then proposed to give secondary evidence of its contents; and with this view called one of their clerks, who swore that when this letter was written, and a considerable time before and after, one *Forbes*, now deceased, was entering clerk in their house; the constant course of business was, for the senior partner to write all the letters; they were then handed over to *Forbes*, who copied them in the letter book, and immediately after sent them off by the post; the witness had frequently compared the copies so taken with the originals, and always found them correct. In the book which was produced there appeared entered in the hand-writing of *Forbes* what professed to be a copy of a letter from the plaintiffs to the defendants, dated 18th December 1807; the witness never saw the original; but he had no doubt, from the course of business, that an original letter, of the same tenor with the copy, had been written by the senior partner of the house, and regularly forwarded to the defendants the day it bore date.—The question was, Whether the entry in the letter-book in the hand-writing of *Forbes* could, under these circumstances, be read to prove the contents of the letter?

Scarlett, for the defendants, insisted that the entry was no evidence without previous proof that a letter, of

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of which it was a correct copy, had been written and regularly sent off by the post.

Lord ELLENBOROUGH.—The rules of evidence must expand according to the exigencies of society. I remember the innovation of receiving evidence of the hand-writing of attesting witnesses abroad to prove the execution of deeds. This entry, I think, is reasonable evidence to prove the contents of the letter of 18th December 1807, which the defendants acknowledge they received, and which they do not produce upon a notice for that purpose. We know that it is the habit of merchants to keep such a book; and a witness has sworn that the book in question was kept with great punctuality. Therefore, if the entry in *Forbes*'s handwriting were not admitted, there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. I will therefore allow the entry to be read as *primâ facie* evidence, and the defendants may rebut it by producing the original.

The plaintiffs had a verdict.

Garrow, S. G. and *Marryat*, for the plaintiffs.

Scarlett for the defendants.

[Attornies, *Gale & Son* and *Windle*.]

In *Price v. Lord Torrington*, *Salk.* 285. which was an action for beer sold and delivered, it appearing that the draymen were in the habit of coming every night to the clerk of the brew-house, and giving him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to

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to which they ſet their hands; on proof that a particular drayman was dead, an entry in this book ſigned by him was held good evidence of a delivery to charge the defendant. So in an action on a tailor's bill, "a ſhop book was allowed for evidence, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries." Pitman v. Maddox, Salk. 690. But the entry of a deceaſed ſervant is not admiſſible, without evidence of his uſual courſe of dealing and his general punctuality. Clerk v. Bedford, Bul. N. P. 282. *Vide* Doe v. Robſon, 15 Eaſt, 32. Hagedorn v. Reid, poſt.

Friday, Dec. 18. WATKINS and Another, Aſſignees of BOWDLER a Bankrupt *v.* MAUND.

If a commiſſion of bankrupt has paſſed the great ſeal, although it never be opened or acted upon, it has *iſſued* within the meaning of 49 Geo. 3. c. 121. ſ. 2. ſo as to be notice of a prior act of bankruptcy, and to deprive any party who has received payments from the bankrupt after an act of bankruptcy and more than two months before the ſuing forth of the effective commiſſion, of the benefit of 46 Geo. 3. c. 135. ſ. 1.

THIS was an action to recover the ſum of £624. paid by the bankrupt to the defendant after an act of bankruptcy.

The defence was, that the payment had been made more than two calendar months before the date of the commiſſion, ſo as to be protected by 46 Geo. 3. c. 135. ſ. 1.

To rebut this, the plaintiffs put in two commiſſions, which had iſſued againſt the bankrupt prior to the payment and act of bankruptcy, and which had been ſuperſeded without being opened.

Garrow, S. G., inſiſted that theſe commiſſions were no notice to the defendant of the bankrupt having

committed an act of bankruptcy or being insolvent. They had remained in the attorney's bag till they were superseded; they had never been acted upon; no advertisement had been published in the Gazette, or any other newspaper, respecting them; and probably no one knew of their existence but the petitioning creditor and the persons officially employed in making them out. Stat. 49 Geo. 3. c. 121. s. 2. provides that the *issuing* of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed notice. But *issuing* cannot mean merely passing the Great Seal. This is a matter of as great secrecy as striking a docket, which was made notice by 46 Geo. 3. c. 135.; and the 49 Geo. 3. c. 121. recites in the preamble, that the aforesaid provision had not been attended with the good effects which were expected therefrom. The intention of the legislature therefore must have been, to substitute something of which men might be cognizant with reasonable diligence. A commission issued must mean, a commission opened and acted upon, though afterwards superseded.

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Lord ELLENBOROUGH.—I must consider that a commission of bankrupt has *issued* when it is delivered out under the Great Seal; and the act expressly says, that the issuing of a commission of bankrupt shall be deemed notice of an act of bankruptcy proved to have been committed at the time of issuing such commission. The issuing of the commission was properly substituted for something still more loose, viz. the striking of a docket. The defendant must therefore be conclusively taken to have known of the prior act of bankruptcy at the time of the payment; and being thus

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thus deprived of the benefit of these statutes, he cannot retain the money which he then received.

Verdict for the plaintiff.

Park and *Littledale* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Hartley* and *Hellyer.*]

As to what shall be notice of *insolvency* where there has been no prior commission, see *Anonymous*, 1 Camph. 492. n.

Wednesday, Dec. 23.

WM. SPENCER *v.* BILLING.

If there be one invariable mode in which bills of exchange are drawn between particular parties, this may be proved by parol evidence, without any of the bills being produced.

THIS was an action of trespass to try the validity of a commission of bankrupt sued out against the plaintiff jointly with his brother *James*, which was impeached on two grounds; 1st, that there had been no partnership between the brothers; and 2dly, that William the plaintiff had committed no act of bankruptcy. *James* carried on business in Manchester under the firm of *James Spencer & Co*; and *William* under that of *Spencer & Co.* in Cateaton Street in the city of London.

To prove the partnership, a circumstance mainly relied upon by the defendant was, that the plaintiff or his clerk had been in the habit of accepting bills drawn upon

upon *James Spencer & Co.* and addreſſed to the houſe in Cateaton Street, where he carried on his buſineſs. Without any of theſe bills being produced, a witneſs was aſked, Whether the plaintiff had been in the habit of accepting bills ſo drawn and addreſſed.

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Lord ELLENBOROUGH, interpoſing, deſired the witneſs to ſtate, whether there was one invariable courſe of dealing between the parties to theſe bills, according to which they were drawn and accepted. The witneſs anſwered, that there was, and that they were always in the ſame form.

Garrow, S. G. for the plaintiff ſtill inſiſted that no examination concerning theſe bills ought to be permitted unleſs they were produced. The anſwers of the witneſs could only amount to parol evidence of the contents of a written document.

Lord ELLENBOROUGH.—I am clearly of opinion that parol evidence may be received of one invariable mode of dealing between parties by means of bills of exchange. If the mode of dealing varies, the bills muſt be produced; otherwiſe, we ſhould be receiving parol evidence of an individual written inſtrument, which is not permitted. But where bills are ſworn to be always drawn and accepted in the ſame form, I think the courſe of dealing ſo eſtabliſhed may be proved by the parol examination of a witneſs, for the purpoſe of ſhewing in what relation the parties ſtood to each other.

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Where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his own home without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left the house of business there to avoid an arrest, at the same time carrying their books of account along with them, —*held*, that they both thereby committed an act of bankruptcy.

With respect to the act of bankruptcy, it was sworn that the plaintiff having been travelling on business in the north of England, went to Manchester in September, and for two days stayed at his brother's lodgings, and occasionally visited the counting-house in which his brother carried on business. At the end of that time, both brothers being afraid of being arrested by a creditor, set off privately in a post-chaise to Halifax in Yorkshire, and carried all the books of *James Spencer & Co.* along with them.

Garrow, S. G. objected that this was no act of bankruptcy in the plaintiff *William*, as his dwelling-house and house of business were both in London, from which he had not absented himself with a view to delay his creditors.

Lord ELLENBOROUGH.—The partnership being established, the counting-house at Manchester must be considered the counting-house of *William* as much as of *James*. The going to Halifax in the manner described was certainly an act of bankruptcy in both, not less according to the language of the statutes, than the etymology of the word;—it was a breaking up of the bank.

Verdict for the plaintiff.

Garrow, S. G. *Park*, and *Campbell*, for the plaintiff.

Topping, *Scarlett*, and *Richardson* for the defendant.

[Attornies, *Nind* and *Milne*.]

Vide Robertson v. Liddell, 9 East, 487.

HUBBARD

HUBBARD *v.* GLOVER.

Thurſday, Dec. 24.

In effecting a policy of inſurance from Ruſſia to this country while the ſhip was on the outward voyage, the broker repreſented to the underwriters *that a cargo was ready for her, and ſhe was ſure to be an early ſhip.*— Held, that this amounted only to a repreſentation of what was *expected* on the part of the aſſured, and that the underwriters were liable, although from the delay in beginning to load the cargo, the voyage home was turned from a ſummer to a winter riſk.

THIS was an action on a policy of inſurance on the ſhip Alexander, at and from Peterſburgh or Cronſtadt to London, at a premium of 20 guineas per cent. to return 10 for arrival.

The policy was ſubſcribed by the defendant on the 13th of June 1811. Before ſubſcribing it, he wiſhed a warranty to be introduced, that the ſhip ſhould ſail before the firſt of Auguſt; upon which the broker obſerved, "There is no occaſion for that; the ſhip "has ſailed ſome time, and muſt now be at Gotten- "burgh. *There is a cargo ready for her; and ſhe is* "*ſure to be an early ſhip.*"

In point of fact ſhe had reached Gottenburgh ſome days before this converſation, and ſhe performed her voyage to Cronſtadt without any accident or delay. The captain from his arrival there was ready to take the cargo on board; but the firſt part of it was not ſent along ſide till the 8th of September. On the 30th of the ſame month the ſhip ſailed on the homeward voyage, and after lying ſome ſome time for convoy at Matwick, was wrecked on the 11th of November off the coaſt of Denmark. Before ſhe ſailed from Cronſtadt the winter riſk had begun, and the current premium had riſen to 30 guineas to return 10.

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Scarlett, for the defendant, contended, that under theſe circumſtances the underwriters were not liable. The broker had repreſented that there was a cargo ready for the ſhip. This he did not ſtate as matter of expectation or belief; but he directly and poſitively aſſerted it as a fact within his own knowledge, or that of his employer. Therefore, the only thing to be conſidered is, the materiality of the repreſentation; and there can be no doubt that it was moſt material. If the cargo had been ready for the ſhip upon her arrival at Cronſtadt, in all probability ſhe would have returned in ſafety. Upon the repreſentation made, the underwriters contemplated a ſummer riſk, and were contented to receive the ſummer premium; but by the repreſentation being falſified, a winter riſk was attempted to be thrown upon them, and the loſs had ariſen which the aſſured now ſought to recover.

Lord ELLENBOROUGH.—Had the deſired warranty been introduced into the policy, that would have been falſified, and the underwriters would have been diſcharged. But I find no repreſentation here upon the falſity of which they can defend themſelves. The broker ſaid, the ſhip had ſailed ſome time, and muſt then have reached Gottenburgh; that a cargo was provided for her; and that ſhe muſt be an early ſhip. Of theſe circumſtances, only the firſt could be conſidered as within his own knowledge; and that was true. The next was likewiſe true, although only matter of probable conjecture; for the ſhip had reached Gottenburgh ſome days before. He ſaid in unqualified terms that a cargo was ready; but this from its very nature was only the ſubject of expecta-

tion and belief. Neither he nor his principal could be ſuppoſed to have been at Cronſtadt or Peterſburgh to ſee the cargo in a warehouſe or on the wharf there; and I believe it is by no means an uſual thing to have a cargo of Ruſſia produce prepared for any particular ſhip before ſhe ſails on the outward voyage. All the broker could be underſtood to mean was, that a cargo had been ordered for the ſhip in queſtion, and that there was every reaſon to ſuppoſe it would be ready for her by the time of her arrival, ſo that ſhe might be expected to be an early ſhip. We have no evidence that this repreſentation does not perfectly accord with the truth. The defendant, inſtead of inſiſting upon the warranty, choſe to ſpeculate upon probabilities. He erred in his calculation; but that is no reaſon why he ſhould not pay the loſs.

Verdict for the plaintiff.

Garrow, S. G. and *Richardſon*, for the plaintiff.

Scarlett and *Campbell* for the defendant.

[Attornies, *Willis* and *Blunt*.]

So a repreſentation by the owner of goods inſured, as to the time of the ſhip's ſailing, is to be conſidered as matter of expectation, and if made bonâ fide, does not conclude him. Bowden v. Vaughan, 10 East. 415.

Thurſday, Dec. 24.

WAGGETT *v.* SHAW.

Refuſal to certify for ſpecial jury, on application made the day after the trial.

THIS cauſe was tried here the preceding day before Lord Ellenborough and a ſpecial jury, when the plaintiff recovered a verdict.

Scarlett, who led for the plaintiff, now applied that his Lordſhip would certify under 24 Geo. 2. c. 18. that it was a proper cauſe to be tried by a ſpecial jury.

Lord ELLENBOROUGH.—The ſtatute provides, that "the *judge* before whom the cauſe is tried (if he ſees "fit) ſhall *immediately after the trial* certify in open "court under his hand, upon the back of the record, "that the ſame was a cauſe proper to be tried by a "ſpecial jury." I do not think I have authority to grant ſuch a certificate the day after the trial, and I have always been in the habit of refuſing applications ſo made.

Scarlett and *Barnewall* for the plaintiff.

Garrow, S.G. for the defendant.

[Attornies, *Blunt* and *Bourdillon*.]

But a certificate under 43 Eliz. c. 6. to deprive the plaintiff of coſts, the damages being under 40s. may be granted at any time after trial. 3 T.R. 38.—So of a certificate under 7 Jac. 1. c. 5. to entitle the defendant to double coſts. 7 T.R. 448.—The ſame of a certificate under 22 & 23 Car. 2. c. 9. that a battery was proved, or that the title of the land came in queſtion. 11 Mod. 198.—And the like as to a certificate under 8 & 9 W. 3. c. 11. that the treſpaſs was wilful and malicious. 6 T.R. 12. 7 T.R. 449.

M'BRAIN

M'BRAIN *v.* FORTUNE and another.

In an action for goods sold, a person who entered into a contract for the purchase of the goods in his own name, is not a competent witness to prove that he purchased them as the agent of the defendant.

THIS was an action to recover the value of a cargo of fish, alledged to have been sold by the plaintiff to the defendants.

The goods were in fact purchased by one *Summers* in his own name; but the plaintiff contended that *Summers* in this transaction was the mere agent of the defendants, and entered into the contract on their account and by their orders.—The sale to *Summers* in his own name being proved, it was proposed to call him as a witness to establish the agency.

Park for the defendant objected, that the witness was incompetent, as he was himself *primâ facie* liable, and he would be discharged if the plaintiff recovered in this action.

Garrow, S. G. *contrà*, contended that the witness ought to be received, *first*, on the ground of necessity; and *secondly*, because he would have a remedy over against the defendants, if he should afterwards be sued as their agent; and they might maintain an action against him if he exceeded his authority. This is the common case of a broker, who is called to prove the contract.

Lord ELLENBOROUGH.—I do not think *Summers* can be examined, either on the ground that he is a necessary witness, or that he stands indifferent between

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the parties. If he was the agent of the defendants, there is no reaſon why this circumſtance may not be proved by other evidence. Then he has a clear intereſt, without any counterbalance, in the event of this action. If it ſucceeds, the verdict would be evidence for him in an action againſt himſelf, to which he is prima facie liable. The remedy which it is ſuppoſed he would have againſt the defendants if he were ſued upon this contract, cannot be thought to render it a matter of indifference to him whether the plaintiff ſhall ſucceed in this action or be driven to ſue him as the real purchaſer of the goods. He is not in the ſituation of a broker; for the broker buys and ſells in the name of his principal, and has no perſonal liability to be diſcharged by the effect of his evidence.

Plaintiff nonſuited.

Garrow, S.G. and *Marryat* for the plaintiff.

Park, for the defendant.

[Attornies, *Rivington* and *Nettleſhip*.]

Vide Wright *v.* Wardle, 2 Campb. 200.

COURT OF COMMON PLEAS.

HAIGH and Others, Aſſignees, &c. of LAZARUS & COHEN Bankrupts, *v.* DE LA COUR. Monday, Nov. 2.

THIS was an action on a policy of inſurance on goods valued at £5,000. on board the Maria at and from London to Pernambucco.

If goods are fraudulently over-valued in a policy of inſurance with intent to cheat the underwriters, the contract is entirely vitiated, and the aſſured cannot recover even for the value actually on board.

In this caſe the defendant had ſigned an adjuſtment, on invoices and bills of lading being produced to him which had been furniſhed by the aſſured, repreſenting that goods above the value of £5,000. had been ſhipped by them on board the Maria. Theſe invoices were now proved to have been fictitious, and the bills of lading to have been interpolated after they were ſigned by the captain. In fact, goods were ſhipped by the bankrupts to the value of £1,400. and no more. The ſhip was afterwards run away with and carried to the Weſt Indies, where the cargo was diſpoſed of by a perſon whom the bankrupts put on board in quality of ſupercargo.

Shepherd, Serjt., for the plaintiffs, allowed they could not recover to the full amount of the valuation in the policy; but inſiſted that as there were ſome goods on board belonging to the bankrupts, the aſſignees had a right to a verdict *pro tanto*. This could only be looked upon as a caſe of ſhort intereſt.

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HAIGH and others, Aſſignees, &c. of LAZARUS and COHEN, Bankrupts, *v.* DE LA COUR.

Sir JAMES MANSFIELD, C. J.—If the bankrupts intended from the beginning to cheat the underwriters, the aſſignees can recover nothing. The fraud entirely vitiates the contract.

Plaintiffs nonſuited.

Shepherd and *Beſt*, Serjts., and *Copley*, for the plaintiffs.

Lens and *Vaughan*, Serjts., and *Campbell*, for defendant.

[Attornies, *Blunt* and *Annesley*.]

ADJOURNED SITTINGS IN K. B. AT GUILDHALL.

Before Hilary Term,

53 GEORGE III.

Monday, Jan. 18.

JOSEPH and Others *v.* KNOX.

A perſon who ſhips goods in an Engliſh port, as the agent of the owner of the goods reſident, abroad, and pays the freight for them, may maintain an action in his own name for not delivering them according to the bill of lading.

THIS was an action againſt the owner of a ſhip on a bill of lading ſigned by the maſter, for not carrying goods from London to Surinam.

The bill of lading ſtated that the goods were ſhipped by the plaintiffs; that they were to be delivered in Surinam to *Levy Davids* or his aſſigns; and that the freight was paid in London.

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The goods consisted chiefly of butter, which the plaintiffs had received from *Suffman & Polack* of Amsterdam, to be forwarded to *Levy Davids* in Surinam, and which in an answer to a bill in equity they swore they believed to be his property.

Topping, for the defendant, insisted, that this action could not be maintained by *Joseph & Co.*, who had no interest in the goods. They were merely the conduit through which the goods were to be transmitted from *Suffman & Polack* at Amsterdam to *Levy Davids* at Surinam. The property being in *Levy Davids*, he alone was injured by the non-delivery of the goods, and he alone could sue to recover their value. It has often been decided that an action against a common carrier for the loss of goods must be brought by the purchaser who ought to receive them, and not by the vendor who has delivered them to the carrier (*a*). There, the vendor delivers them merely as the agent of the purchaser, and on that ground can maintain no action respecting them. What difference can it make that here the goods were to be conveyed on board a ship? The plaintiffs were still merely the agents of the real owner of the goods.

Lord ELLENBOROUGH.—I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid

(*a*) Dawes v. Peck, 8 T. R. 330. Dutton v. Solomonson, 3 Bos. & Pul. 584.

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by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shippers they have no interest in the goods and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner (*a*).

It appeared that the ship in question was in the same fleet mentioned in the case of *Van Omeron* v. *Dowick*, 2 Campb. 42. and that the goods were sold at Grenada, exactly under the same circumstances.—Lord ELLENBOROUGH again laid down the same doctrine with regard to the authority of the master over the cargo, which was acquiesced in on the part of the defendant, and the plaintiffs had a verdict.

Garrow, S. G. *Park*, and *Taddy*, for the plaintiffs.

Topping and *Campbell* for the defendant.

[Attornies, *Kaye & Co.* and *Michell.*]

(*a*) But where the freight is not paid by the shipper, and the goods are stated in the bill of lading to be shipped by order and on account of the consignee, the action can only be maintained by the latter, Brown v. Hodgson, 2 Camb. 36.

SMITH

SMITH *v.* WOOD.

Wednesday, Jan. 20.

THIS was an action for a libel upon the plaintiff in the shape of a caricature print entitled, "The inside of a parish workhouse with all abuses reformed."

A person who having a copy of a libellous caricature, shews it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it.

A witness stated, that having heard the defendant had a copy of this print, he went to his house and requested liberty to see it. The defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed.

Lord ELLENBOROUGH ruled that this was not sufficient evidence of publication to support the action—And

The plaintiff was nonsuited.

Best, Serjt., *Park*, and *Campbell*, for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Parton* and *Stratton*.]

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Hilary Term,

53 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Saturday, Feb. 13.

MAYOR and Others *v.* JOHNSON and EATON.

A traveller received a bank note in a provincial town, which he cut in two, and sent the halves on different days by the post, addreſſed to his employers in London; one of theſe was ſtolen from the mail coach, and they received the other.—*Held*, that under theſe circumſtances, they could not maintain an action againſt the makers of the note on producing that half of it which reached them ſafely.

THE plaintiffs declared in the uſual form as bearers, againſt the defendants as makers, of a £5. promiſſory note of the Stamford and Rutland bank, payable at Stamford, or at Meſſrs. Ramſbottom, Newman, Ramſbottom, & Co.'s, bankers, London.

The plaintiffs carry on buſineſs in London. The note in queſtion was received at Nottingham on their account by their traveller. According to his uſual mode of proceeding on ſuch occaſions, he cut it into two parts. The one he put into the poſt-office at Nottingham, incloſed in a letter for the plaintiffs, on the 26th

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26th of October last. This never reached them, the bag containing it having been stolen from the Leeds mail. The other half, which was sent from Nottingham on the 28th, they duly received and presented for payment at Ramsbottom & Co.'s, who refused to pay it without orders from the defendants. The defendants being written to on the subject, pronounced the application impertinent.—The latter half of the note produced at the trial was in the following form:

Rutland Bank No. A. 524.
pay the Bearer Five Pounds
Bank at Stamford or at
Newman, Ramsbottom & Co.
received 3d Sept. 1810.
Wm. Johnson & Stephen Eaton.
Stephen Eaton.

The handwriting of the defendant *Eaton* was proved to the note; the traveller who received it at Nottingham stated the manner in which he had divided it and put the two parts into the post-office there; and a clerk from the General Post Office in Lombard Street swore that the Nottingham bag of the 26th October, on account of the robbery of the Leeds mail, had not arrived in London. It was alleged that a sufficient indemnity had been offered by the plaintiffs to the defendants before the commencement of the action; but of this no evidence was given, and it was not considered material.

Lord ELLENBOROUGH.—I am of opinion that this action cannot be maintained. It is usual and proper to pay upon an indemnity; but payment can be enforced at law only by the production of an entire note,

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or by proof that the inſtrument, or the part of it which is wanting, has been actually deſtroyed. The half of this note taken from the Leeds mail may have immediately got into the hands of a *bonâ fide* holder for value, and he would have as good a right of ſuit upon that as the plaintiffs upon the other half which afterwards reached them. But the maker of a promiſſory note cannot be liable in reſpect of it to two parties at the ſame time.

Plaintiffs nonſuited.

Garrow, S. G. &—— for the plaintiffs.

Park for the defendants.

[Attornies, *Bickerton* and *Anſtice*.]

Vide Pierſon v. Hutchinſon, 2 Campb. 211.

Saturday, Feb. 13.

SHEPHERD Gent. one, &c. v. MACKOUL.

If a huſband turns his wife out of doors, and it is neceſſary for her ſafety to exhibit articles of the peace againſt him, he is liable to an attorney employed by her for that purpoſe.

Where a wife was indicted for keeping a diſorderly houſe, which ſhe had done with her huſband's concurrence;—*held*, that he was liable to an attorney, whom ſhe employed to defend her, and by whom he knew that ſhe was defended.

THIS was an action on an attorney's bill for buſineſs done on the retainer of the defendant's wife. The firſt part of the bill was for aſſiſting her to exhibit articles of the peace againſt her huſband; and the ſecond for defending her upon an indictment for keeping a bawdy-houſe.

It appeared that the defendant without juſt cauſe had turned his wife out of doors with circumſtances of great violence, and that ſhe exhibited articles of the peace againſt him prepared by the plaintiff; that ſhe afterwards kept a houſe of the deſcription above mentioned; that the defendant was privy to her doing ſo; that ſhe was indicted for it, and that he knew ſhe was defended by the plaintiff.

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Lord ELLENBOROUGH.—The defendant's liability for the firſt part of the charge will depend upon the neceſſity for exhibiting articles of the peace againſt him. If that proceeding was uncalled for, his wife certainly could not make him liable for the expence thereby incurred. But if ſhe was turned out of doors in the manner ſtated, ſhe carried along with her a credit for whatever her preſervation and ſafety required. She had a right to appeal to the law for protection, and ſhe muſt have the means of appealing effectually. She might therefore charge her huſband for the neceſſary expence of this proceeding as much as for neceſſary food or raiment.—With reſpect to the defence upon the indictment, as the defendant knew and approved of the buſineſs his wife carried on, and was aware of the proſecution, without expreſſing any diſſent to the plaintiff's defending her, I think a promiſe may be fairly inferred on the part of the defendant to pay the plaintiff for his labour in conducting the defence.

The plaintiff had a verdict for his whole demand.

Garrow, S. G. and *Reader* for the plaintiff.

Topping for the defendant.

[Attornies, *Shepherd* and *Kiſs*.]

Wherever the huſband cauſeleſsly turns away his wife, he is liable for neceſſaries ſupplied to her. Thompſon v. Harvey, 4 Burr. 2177. *Aliter*, if he does ſo for juſt cauſe. Ham v. Toovey, Selw. N. P. 290. 2d edit.

CLARKE

Saturday, Feb. 13.

CLARKE v. BROUGHTON.

Although it may be a defence to an action for penalties on 5 Ann. c. 14. that the defendant joined in the ſport as ſervant to another, he muſt give ſtrict evidence that the perſon by whoſe orders he acted was himſelf qualified to kill game.

ACTION on 5 Ann. c. 14. for keeping and uſing a dog and a gun for the deſtruction of game.

The defendant, who is a farmer, being in company with one *Boycott* on the occaſion in queſtion, both having guns in their hands, the latter ſhot a hare, which the former picked up.

Garrow, S. G., for the defendant, relying upon *Rex* v. *Taylor*, 15 Eaſt, 460. ſtated from his inſtructions, he ſhould prove that his client upon this occaſion had gone out to ſhoot ſome crows, for the purpoſe of hanging them up in a field lately ſown with beans; that he accidentally met with *Boycott*, a qualified ſportſman; that ſoon after the hare got up, which *Boycott* ſhot, and that the defendant picked it up by *Boycott's* expreſs orders.

Lord ELLENBOROUGH ſaid, theſe facts, though not very probable, if ſatisfactorily made out, might amount to a defence. He therefore allowed the witneſſes to be called.—It turning out, however, that *Boycott* could not be ſatisfactorily proved to have any qualification to kill game himſelf, Lord ELLENBOROUGH clearly held, that the defendant could not juſtify as his ſervant.—And

The plaintiff had a verdict for one penalty.

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Topping and *King* for the plaintiff.

Garrow, S. G., for the defendant.

[Attornies, *Ayton* and *Denton*.]

Vide Lewis *v.* Taylor, K. B. T. 52 Geo. 3. 16 East. 49.

FIRST SITTINGS AFTER TERM AT GUILDHALL.

HUTCHINSON *v.* REID.

Monday, Feb. 15.

Where goods are ſold, to be paid for by a bill of exchange at a given date, to an action commenced within that time for refuſing to give ſuch bill, the defendant cannot ſet off a debt due to him from the plaintiff.

THIS was an action of aſſumpſit for not accepting a bill of exchange for the price of three puncheons of rum ſold by the plaintiff to the defendant on the 2d December 1812, to be paid by bill at two months. The declaration likewiſe contained counts for goods ſold and delivered. The action was commenced on the firſt day of Hilary term laſt.

The defendant pleaded the General Iſſue, and gave a notice of ſet-off for goods ſold and delivered.

It was proved that the rum had been ſold to the defendant on the terms ſtated in the declaration; and that he afterwards refuſed to accept a bill for the price, which amounted to £97., ſaying, the plaintiff ſhould have credit for it in account. It likewiſe appeared that

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at that time, the plaintiff owed the defendant a ſum of about £300. for goods ſold; and the queſtion was, whether this could be ſet off againſt the plaintiff's demand in the preſent action.

Park, for the defendant, contended that it might. What the plaintiff ſought to recover was, the price of the rum he had ſold to the defendant. That was a liquidated debt amounting exactly to £97. Though not ſought to be recovered under the count for goods ſold and delivered, its amount was aſcertained with equal preciſion. In fact, the croſs demands were exactly of the ſame nature, and it would be monſtrous injuſtice if the one could not be ſet off againſt the other.

Lord ELLENBOROUGH.—Had this action been commenced after the two months had expired, I think the ſet-off muſt have been permitted. But on the firſt day of laſt Hilary term, there was no debt actually due to the plaintiff. How can I ſay then that this is a caſe of mutual debts, which may be ſet off againſt each other? The action is not brought for a debt, but for a refuſal to do a collateral act. The plaintiff was entitled to a bill of exchange for £97. as ſoon as he had delivered the rum; and it is for refuſing to give him one that the defendant is now ſued. The plaintiff's demand therefore is for unliquidated damages, to which a ſet-off is wholly inapplicable. If the defendant wiſhed to reſerve a power of ſettling for the rum in account, he ſhould have taken care not to ſtipulate to pay by a bill of exchange.

The plaintiff had a verdict for £97.

Garrow,

Garrow, S. G., and *Richardſon*, for the plaintiff.

Park for the defendant.

[Attornies, *Sherwood* and *Saggers*.]

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Vide Muſſen v. Price, 4 Eaſt. 147 Dutton v. Solomonſon, 3 Boſ. & Pul. 582.

ADJOURNED SITTINGS AT WESTMINSTER.

GODARD and Another *v.* BENJAMIN, Gent. one, &c.

Thurſday, Feb. 18.

In an action againſt an attorney for goods ſold, the plaintiff proved that he filed his bill at half paſt eleven in the forenoon of 24th Dec. and the defendant gave in evidence a receipt for the ſum demanded, dated the ſame day.—*Held*, that this was no anſwer to the action, without proof that the payment was made before filing of the bill.

THIS was an action for goods ſold and delivered.

The plaintiffs' original demand was £4. 11s. which they admitted had been paid to them by the defendant on the 24th day of December laſt; and the only queſtion was, whether this payment was to be conſidered as made before or after the commencement of the action.

The plaintiffs proved, that they filed their bill againſt the defendant on the 24th day of December at half paſt eleven in the forenoon; but there was no evidence whatever of the time when notice of the bill being filed was ſerved upon the defendant.—On the other hand, the defendant put in a receipt ſigned by

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the plaintiffs' agent for the £4. 11s. dated 24th Dec. without ſhewing at what hour of the day the money had been paid.—The action was continued becauſe the defendant refuſed to pay the coſts of the bill.

Garrow, S. G., for the plaintiffs, contended, they had a right to proceed for their coſts, as the action was commenced from the moment the bill was put upon the file in the King's Bench Office, and the defendant had not ſhewn the debt to have been previouſly ſatisfied.

Scarlett, *contrà*, denied that the action was commenced till the defendant had notice of the filing of the bill regularly ſerved upon him. The bill remained upon the file a mere dead letter during ſuch time as the defendant was not called upon to anſwer it. There was no evidence here that the defendant had notice of the bill during any part of the 24th, and on that day he had certainly paid the debt.—But even if the filing of the bill was the commencement of the action, the debt had been paid the ſame day the action was commenced, and the Court might preſume that the debt was paid before the bill was filed.

Lord ELLENBOROUGH.—I am clearly of opinion that the filing of a bill is the commencement of an action againſt an attorney, without notice being ſerved upon him. It follows, therefore, that this action was commenced on the 24th of December at half paſt eleven in the forenoon. Why am I to preſume that the debt was previouſly ſatisfied? If the fact was ſo, the defendant might have ſhewn it by calling the plaintiffs'

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tiffs' agent who received the money. Is it not as probable, that he made the payment after knowing that the bill was filed? At any rate, the *onus* lay upon him to prove payment before action brought.

Verdict for the plaintiffs, with nominal damages.

Garrow, S. G., and *Comyn*, for the plaintiffs.

Scarlett, for the defendant.

[Attornies, *Turville* and *Benjamin*.]

Vide Toms v. Powell, 7 East. 536.

ANSLEY *v.* BIRCH.

Thursday, Feb. 18.

At Nisi Prius in K. B. the plaintiff cannot apply to put off the trial of his cause from Sittings to Sittings, but may from one day in the Sittings to another.

GARROW, S. G., for the plaintiff, applied that the trial of this cause might be put off for two days, on an affidavit stating, that a witness had been suddenly taken ill the preceding night; but was likely to be able to attend on the following Saturday.

Marryat, on the other side, contended, that an application to put off a trial was never listened to when made on the part of the plaintiff, who having a controul over his own record, has only to withdraw it if he finds he is not prepared to try the cause.

Lord ELLENBOROUGH.—Where the trial is to be put off beyond the present sittings, such is the rule I have observed. The plaintiff in that case must with-

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draw his record. Much valuable time is thus ſaved, which would be waſted in theſe applications. Nor is there any great hardſhip impoſed upon the plaintiff; for even if I were to make an order to put off the trial, he muſt pay coſts to the defendant; and, either way, he can bring on his cauſe again for trial with equal facility. But where, from the ſudden indiſpoſition of a witneſs, who may be able again to attend in the courſe of a day or two, or for any temporary reaſon, the plaintiff is prevented from trying his cauſe in its order in the paper, yet has ground to believe he ſhall be able to try it before the ſittings are over, it would be too much to make him withdraw his record; and I think a Judge at Niſi Prius ought to make an order for the trial to ſtand over till ſuch time as the witneſs is likely to attend.—Let the trial of this cauſe be poſtponed to the day mentioned by the Solicitor General.

Friday, Feb. 19.

ROBINS v. GIBSON.

Where a bill is drawn upon funds which there is reaſonable ground to expect will reach the hands of the drawee before it becomes due; although they do not, the drawer is entitled to notice of its diſhonor.

THIS was an action againſt the drawer of a bill of exchange, dated at Buenos Ayres, 13th September 1812.

To excuſe the want of notice the drawee was called and ſtated, that he had no funds of the drawer in his hands between the time when the bill was preſented for acceptance and its becoming due; but he admitted,

Where the drawer of a foreign bill of exchange happens to be in England when it becomes due and is diſhonored, it is enough for the purpoſe of charging him, to have the bill proteſted, and to give him notice of the fact of its diſhonor, without communicating the proteſt to him, or ſending a copy of it to the place where the bill was drawn.

on

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on croſs-examination, that he had notice before the bill was firſt preſented, that it was drawn on a cargo of indigo and hides ſhipped from Buenos Ayres by the drawer; that the cargo was at that time in the hands of a broker for ſale; that one *Whitby* was to pay over the proceeds to anſwer the bill; that before the bill was preſented for payment the hides had been ſold and a loſs had ariſen on them; but the indigo was not ſold; and that without applying to *Whitby* on the ſubject, he had refuſed payment as not having funds.

Lord ELLENBOROUGH ruled, that the bill having been drawn on expected funds, it was neceſſary to prove notice of its diſhonour (*a*).

The plaintiff then proved that a proteſt was regularly drawn up; and read a letter from the defendant, dated 1ſt September 1812, giving the drawee notice of the bill drawn upon him, and ſaying that he was going to Rio Grande, and when he returned to the Havannah would write again. It was alſo proved that the drawer arrived in England before the bill was due, and that within the uſual time for that purpoſe a letter was ſent to his houſe, ſtating that the bill was diſhonoured, but not communicating the proteſt or a copy of it.

Puller, for the defendant, objected, that the plaintiff was bound to ſhew, either that the proteſt had been ſent out to Buenos Ayres, or that it had been regularly communicated to the defendant in England. This being a foreign bill of exchange, a proteſt was the

(*a*) Rucker v. Hiller *ante* 217.

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only notice of its dishonour known by the custom of merchants; and according to the evidence before the jury, no such notice had either been personally conveyed to the defendant, or sent to the place from which the bill was drawn, where he might have been expected to be found.

Lord ELLENBOROUGH was of opinion, that under the circumstances of the case enough had been done.

And the plaintiff had a verdict.

In the ensuing term a rule to shew cause why the verdict should not be set aside and a new trial granted was refused, the Court being of opinion it was sufficient that the bill was protested, and that the defendant had notice of the fact of its dishonour, although the protest was not communicated to him. They observed, that this gave him an opportunity of calling for the protest if he wished to see it.

Garrow, S. G. and *Hulton*, for the plaintiff.

Puller for the defendant.

[Attornies, *Stokes* and *Kibblewhite*.]

Vide Cromwell v. Hynson, 2 Esp. N. P. Cas. 511.

LEE q. t. *v.* BIRRELL.

Friday, Feb. 19.

THIS was an action of debt to recover a penalty of £100. for acting as a committee-man of the parish of St. Martin-in-the-Fields, being at the same time a collector of the property tax.

Notwithstanding the oath administered to a collector of the property tax by the commissioners, that he will not disclose any thing he learns in that capacity, except with their consent, or by virtue of an act of parliament, he is bound, when subpœnaed as a witness, to give evidence of all facts within his knowledge touching the matter in question.

To prove that the defendant was a collector of the property tax at the time in question, the clerk to the commissioners was called, and desired to produce the book containing the defendant's appointment.

The witness refused to produce the book, or to answer any question concerning the defendant's acts as collector, on the ground that before entering upon his office as clerk to the commissioners, they had administered an oath to him, not to disclose any thing he should learn in that capacity respecting the property tax, except with their consent, or by force of an act of parliament.

Lord ELLENBORGUGH.—I clearly think the oath contains an implied exception of the evidence to be given in a court of justice in obedience to a writ of subpœna. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him.

The witness had not brought the book along with him; but the plaintiff recovered a verdict (subject to the

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the opinion of the court) upon another count of the declaration, charging the defendant with having acted as a committee-man while he was a collector of the assessed taxes.

Holroyd and *Abbott* for the plaintiff.

Gartrow, S. G. and *Richardson* for the defendant.

[Attornies, *Wilshen* and *Finmore*.]

EDDEN *v.* READ.

A receipt for taxes signed by a clerk of the Deputy Receivers General of a county in their name, may be given in evidence without a stamp.

THIS was an action for money had and received, to recover the sum of £100, alleged to be due from the defendant to the plaintiff under the following circumstances:

The plaintiff was a collector of king's taxes in the parish of *Drayton Bassett*, in the county of Stafford. The defendant was a clerk to *Messrs. Spooner and Attwood*, bankers at Birmingham, and Deputy Receivers General for the county of Stafford. According to the plaintiff's case, on the 3d of August 1809, he paid the defendant the sum of £500 for taxes, and had a receipt from him for that sum. The defendant insisted that the receipt was given for that sum by mistake, and that he only received £400, which was all that was carried to the plaintiff's credit.

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On the part of the plaintiff, the receipt was now offered in evidence. It was a printed form filled up, and was ſigned "*for Spooner and Attwood*, "WM. READ."

The receipt being objected to, on the ground that it had no ſtamp, ſtat. 48 Geo. 3. c. 141. ſ. 1. Rule 5. was cited, whereby it is directed, that duties and aſſeſſments ſhall be paid in a given manner to the Receiver General, "for which payments the ſaid Re- "ceiver General or his Deputy ſhall give to ſuch col- "lectors, receipts in writing, and for which receipts "no ſtamp duty ſhall be charged or chargeable, any "ſtatute to the contrary thereof notwithſtanding."

N. G. Clarke for the defendant, ſtill inſiſted, that the receipt was inadmiſſible without a ſtamp, as it was given, not by the Receiver General or his Deputy, but by a clerk of *Meſſrs. Spooner and Attwood.*

Lord ELLENBOROUGH.—*Meſſrs. Spooner and Attwood* are the deputies of the Receiver general, and the receipt is ſigned by the defendant as their agent. I therefore think it is given by them as ſuch deputies, within the meaning of the act of parliament, and requires no ſtamp.

A receipt ſigned by an agent for his principals, is not evidence to ſupport an action for money had and received againſt him to recover the money back.

Clarke then objected that the action ought to have been brought againſt *Spooner and Attwood*, and not the defendant, as upon the evidence the money had been received by them, and he muſt be taken to have paid over to them the whole ſum for which the receipt was given.

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Garrow, S. G. *contrà*, contended that the £100 for which the plaintiff had not received credit muſt ſtill be ſuppoſed to be in the defendant's hands.

Lord ELLENBOROUGH.—If the objection is taken, I muſt give effect to it. The only evidence we have of the payment, is the receipt, and that purports that the money was paid to *Spooner and Attwood*. They are the perſons liable, therefore, if the ſum paid really was £500.

Plaintiff nonſuited.

Garrow, S. G. and *Heath* for the plaintiff.

N. G. Clarke and *Brougham* for the defendant.

[Attornies, *Turner* and *Jennings*.]

Vide Duke of Norfolk v. Worthy, 1 Campb. 337.

Saturday, Feb. 20.

WHEELER v. BRAMAH and Another, Aſſignees of BORMAN, a Bankrupt.

The aſſignees of a bankrupt having allowed his effects to remain upon the premiſes occupied by him nearly a twelvemonth after the bankruptcy, for the purpoſe of preventing a diſtreſs paid the arrears of rent due, at the ſame time intimating to the landlord that they did not mean to take to the leaſe unleſs it could be advantageouſly diſpoſed of: the effects were ſoon after ſold and removed from the premiſes: the leaſe was at the ſame time put up to ſale by order of the aſſignees; but there were no bidders for it: they omitted to return the key to the landlord for near four months after: however, they were not aſked for it, and they no otherwiſe made uſe of the premiſes.—*Held*, that they were not, under theſe circumſtances, liable to the landlord as aſſignees of the leaſe.

THIS was an action of covenant for rent, brought againſt the defendants as aſſignees of a leaſe of certain premiſes in Bunhill Row, granted to Borman before his bankruptcy. The pleas were ſimilar to thoſe pleaded in *Turner* v. *Richardſon*, 7 Eaſt, 335.

Borman,

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WHEELER v. BRAMAH and another, Aſſignees of BORMAN, a Bankrupt.

Borman, the leſſee, was declared a bankrupt 26th June 1810, and the defendants were choſen his aſſignees on the 18th of Auguſt following. He preſented a petition to the Lord Chancellor to ſuperſede the commiſſion, which was afterwards diſmiſſed. On the 21ſt May 1811, the bankrupt's effects ſtill remaining on the premiſes, the plaintiff threatened to diſtrain them for three quarters arrears of rent due at the preceding Lady-day. To avoid the diſtreſs, Mr. Dixon, one of the defendants, accepted a bill for theſe arrears, and it was then agreed between him and the plaintiff, that the leaſe ſhould be put up to ſale, to ſee if it was worth any thing, Dixon ſtating, that otherwiſe it was not the intention of the aſſignees to take to the premiſes. On the 28th of the ſame month the bankrupt's effects were ſold on the premiſes, and cleared away by the purchaſers. The leaſe was at the ſame time put up to ſale, by order of the aſſignees; but there was no bidding for it. The key was not ſent by them to the plaintiff till the 21ſt of September following. However, they never made any other uſe of the premiſes. The indenture of leaſe remained all along in the hands of the bankrupt's attorney, who had a lien on it.

Park, for the plaintiff, contended, that under theſe circumſtances the defendants had made themſelves liable as aſſignees of the term. In *Turner* v. *Richardſon*, it was held, the aſſignees of a bankrupt were not liable from the mere circumſtance of putting the premiſes up to ſale for the purpoſe of aſcertaining whether the leaſe was of any value. But here the defendants had done a great deal more. By the payment of rent they acknowledged they were liable as the aſſignees of the

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the term, and if they once took upon themſelves that character, they could not afterwards renounce it.—Beſides, from the length of time they had kept the plaintiff out of poſſeſſion, they muſt be conſidered as having taken to the premiſes. The commiſſion was ſued out in June 1810, and they made no offer to deliver up the key till the month of September in the following year.

Lord ELLENBOROUGH.—I am of opinion that the defendants have done nothing to render themſelves liable as aſſignees of the leaſe granted by the plaintiff to the bankrupt. They paid rent, not as tenants, but for the expreſs purpoſe of preventing a diſtreſs, proteſting at the ſame moment, that they did not mean to adopt the term unleſs, upon a trial being made, it ſhould be found to be valuable. The premiſes were put up to ſale with the plaintiff's concurrence, and it is admitted the defendants had a right to make this experiment without incurring any perſonal liability to the landlord. The only other circumſtance relied upon, is the delay to ſend the key. Had they refuſed to deliver it, they would have been ſubject to an action of ſome ſort at the plaintiff's ſuit; but the queſtion here is, whether the ſimple omiſſion to ſend the key was tantamount to entering and taking poſſeſſion of the premiſes. I clearly think that it was not; and that the defendants muſt be taken to have repudiated the leaſe as they had a right to do.

Plaintiff nonſuited.

Park and *Marryat* for the plaintiff.

Garrow, S. G. and *Comyn* for the defendant.

[Attornies, *Langhorn* and *Edwards*.]

ADJOURNED SITTINGS IN LONDON.

CALVERT v. ROBERTS.

Friday, Feb. 26.

An accommodation bill payable to the drawer's order cannot be altered after acceptance and an attempt to negotiate it, and before it is actually negotiated.

THIS was an action by the indorsee against the acceptor of a bill of exchange, dated 16th March 1812, drawn by *J. Stroud*, payable to his own order at three months after date.

The bill was accepted by the defendant for *Stroud*'s accommodation, and then bore date 10th March. *Stroud* tried to negotiate it as it stood at first, but could not. Several days after, he altered the 10 to 16 and indorsed it away.—The objection being taken that the bill was vitiated by this alteration,—

Park for the plaintiff contended, that an accommodation bill, payable to the drawer's order, may be altered till it is negotiated. While in the hands of the drawer it evidences no contract on which an action can be maintained. A bill for value may be altered before acceptance, and an accommodation acceptance only becomes effectual when the bill is indorsed.

Lord ELLENBOROUGH.—This bill when dated 10th March was a valid and complete instrument, framed

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according to the intentions of the parties. Therefore the date could not afterwards be altered, even with their consent. The alteration was tantamount to the drawing of a new bill.

Plaintiff nonsuited.

Park and *Gaselee* for the plaintiff.

Garrow, S. G. and *Barrow* for the defendant.

[Attornies, *Jones* and *Barrow*.]

Vide Cardwell v. Martin, 9 East. 190. 1 Campb. 79.

Saturday, Feb. 27.

REX v. BARNETT.

Q. as to proper title of stat. 5 Eliz. c. 4. which is stated differently in different editions of the statutes? Where it was set out in an indictment as given by Ruffhead, the judge refused to direct an acquittal for a variance, on production of a copy of the act printed by the King's printer, in which it is given differently.

An indictment cannot be maintained on 5 Eliz. c. 4. for exercising a trade without having served an apprenticeship, unless the defendant is proved to have exercised the trade for the space of a month.

THE indictment charged that the defendant after the making of a certain act of parliament made in the parliament of the Sovereign Lady Elizabeth late Queen of England, &c. at a session thereof holden at Westminster, in the county of Middlesex, in the fifth year of the reign of the said late Queen, entitled, "An "act *containing* divers orders for artificers, labourers, "servants of husbandry, and apprentices," and after the first day of May then next ensuing, to wit, on, &c. and from thence continually afterwards, until the day of taking that inquisition, to wit, for the space of four months and upwards, at, &c. did unlawfully and for his own lucre and gain, use and exercise the craft, my stery

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mystery, and manual occupation of a printer, the same being a craft, mystery, and manual occupation used and exercised within the realm of England at the time of making the said act of parliament, the said defendant not having been brought up therein seven years at the least as an apprentice, in manner and form as in the said act of parliament is mentioned, contrary to the form of the statute in such case made and provided, and against the peace, &c.

Scarlett, for the defendant, objected, that the title of the act of parliament was misrecited in the indictment, and he produced a copy of the act lately printed by the King's Printer, in which it is entitled, "An "act *touching* divers orders, &c."

Lord ELLENBOROUGH was about to direct an acquittal, when *Ruffhead*'s edition of the statutes was produced, in which the title of this act corresponds exactly with that set forth in the indictment.

Scarlett still insisted that the true title of the act must be supposed to be given in the copy printed by the King's Printer.

Lord ELLENBOROUGH said, that in case of a recent statute, he should have acted upon the copy printed by the King's Printer; but with regard to a statute of Queen Elizabeth, he should consider *Ruffhead* to be correct, till the contrary was proved by an examination of the parliament roll.

It appeared in evidence, that the defendant, who was a Jew old clothesman, within the period of time

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mentioned in the indictment, set up a printing press in his house, and printed a Hebrew almanack; but there was nothing to shew how long he had been employed in doing so, and the work might have been done in the course of a few days.

Scarlett insisted that the defendant was entitled to an acquittal, as he had not been proved to have exercised the trade for the space of one month. The statute forbids the exercising of a trade without having served an apprenticeship, "upon pain that every per-"son willingly offending, or doing the contrary, shall "forfeit and lose for every default, forty shillings for "every month." Therefore till the trade had been exercised a month, there was no default, and no penalty was incurred.

Garrow, S. G. *contrà*, contended, that the act was violated, and an indictable offence was committed by exercising the trade in any one instance without having served an apprenticeship; that a discretionary punishment might be inflicted, as in case of other misdemeanors; and that even if the punishment were confined to the penalty, that might be apportioned according to the length of time the jury should find the trade had been exercised.

Lord ELLENBOROUGH.—I am of opinion, that until the trade has been illegally exercised for a month, no indictable offence has been committed. The defendant is therefore entitled to a verdict of acquittal.

Garrow,

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Garrow, S. G. and *Hart* for the plaintiff.

Scarlett and *Beard* for the defendant.

[Attornies, *Jones* and *Isaacs*.]

Vide Cunningham v. Watſon *ante* 249.

DALE *v.* BIRCH AND ANOTHER, Sheriffs of London.

After a return to a writ of *fi. fa.* that the money is levied, the ſheriff is liable to an action for money had and received, without any demand of payment.

THIS was an action for money had and received, to recover the ſum of £49, which the defendants had levied under a writ of *fieri facias* at the plaintiff's ſuit.

The plaintiff's counſel merely gave in evidence an examined copy of the *fi. fa.* and the defendants' return, ſtating that they had levied the £49.

Park, on the other ſide, ſaid this action had been defended to try the queſtion, whether the ſheriffs in every caſe are bound to run in ſearch of the plaintiff to pay him the money levied. He was inſtructed he ſhould be able to prove in this caſe, that as ſoon as the money had been levied and paid into the office, the plaintiff's attorney had notice that he might receive it at any time when he ſhould call or ſend for it. He refuſed, however, to do either, and before making any demand of payment vexatiouſly commenced this action. But if the ſheriffs were liable to be haraſſed with ſuch actions, they might be ruined in performing the duty

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of their office. How could they tell where the plaintiff was to be found? He might not even be within their bailiwick, but in a diſtant part of the world. If they were liable to an action after demand of payment once made,—till then, they were to hold the money to anſwer the exigency of the writ.

Lord ELLENBOROUGH..—Where any vexatious proceedings are inſtituted againſt the ſheriffs, the court will protect them. Upon the facts ſtated, I think the court would have ſtayed this action, and perhaps ſome application for relief may ſtill be made with effect. But ſitting here, I can only conſider whether the action in point of law is maintainable, and I make no doubt that it is. Upon the ſheriffs' return, the £49 was certainly money had and received by them to the plaintiff's uſe; and as it had never been tendered to him, he had ſtrictly a right to bring an action to recover it, without any previous demand of payment.

The plaintiff had a verdict; and it was ſuggeſted on his behalf, that payment had repeatedly been demanded of the officer who had made the levy before the action was commenced.

Jervis and *Campbell* for the plaintiff.

Park and *Andrews* for the defendant.

[Attornies, *Hurd* and *Iſaacs.*]

SMITH

SMITH AND ANOTHER, Aſſignees of WILLIAMS, a Bankrupt, *v.* CURRIE.

Monday, March 2.

A trader who is denied by his own orders to a creditor in the habit of calling upon him to demand a debt when he is at dinner, does not commit an act of bankruptcy, if his intent be to avoid interruption at that hour, and not to delay the creditor, although the creditor be thereby delayed.

THIS was an action of trover againſt the ſheriff of Hertfordſhire, for taking the bankrupt's goods in execution, on the 20th of November laſt; and the queſtion was, whether an act of bankruptcy had been committed before that day.

It appeared that *Williams*, who was a wine and ſpirit merchant at St. Alban's, owed a ſum of money to a carrier of that town. The carrier's collecting clerk had been in the habit of making his rounds between one and two o'clock, which was the time when *Williams* dined. In the month of October *Williams* told his ſervants that the clerk was extremely troubleſome in calling for money at that hour, and deſired that he might be denied to him. The clerk called twice afterwards between one and two to demand a debt due to the carrier; *Williams* was in the houſe both times; but his ſervants ſaid he was from home. They afterwards told him what they had done, and he did not diſapprove of it.—He continued acceſſible to his other creditors at buſineſs hours till after the execution.

Park, for the plaintiff, contended, that the denial to the carrier's clerk was a clear act of bankruptcy in *Williams*, as his creditor was thereby delayed.

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SMITH and another, Assignees of WILLIAMS a Bankrupt, v. CURRIE.

Lord ELLENBOROUGH.—The question is, whether it was *Williams*'s intent to delay a creditor when he ordered himself to be denied. If his object was merely to eat his dinner in peace and quietness, he committed no act of bankruptcy by excluding a creditor while he was so employed. Bankruptcy the law considers a crime, and the intention of the act must be examined. A simple denial to a creditor is not enough to make a trader a bankrupt. He may not only order himself to be denied at unseasonable hours in the night; but in the course of the day when he is taking his meals, and on other occasions which may be easily imagined, he may refuse to see his creditors without meaning to delay them, and therefore without committing an act of bankruptcy, although they should for a time be delayed.

Plaintiffs nonsuited.

Park and *Espinasse* for the plaintiffs.

Garrow, S. G. and *Gurney* for the defendant.

[Attornies, *Woodehouse* and *Aubery*.]

Vide Robertson v. Liddell, 9 East. 487. Holroyd v. Gwynne, 2 Taunt. 176.

LA NEUVILLE and Another *v.* NOURSE and Another. Tuesday, March 2.

THE plaintiffs had sold the defendants ten dozen of Burgundy. In about a twelvemonth after, the defendants applied to have it exchanged for the like quantity of Champagne, a wine then at the same price. The plaintiffs agreed to this, and the exchange took place. When the Burgundy was sent to the defendants, it was of the first quality and in the best condition; but when it was returned, it was found to be quite sour and only fit to be used as vinegar.

This was an action of assumpsit to recover the value of the Champagne, or a compensation for the bad condition of the Burgundy. The declaration contained a great number of special counts, alledging different promises on the part of the defendants, that the wine returned was in good condition; but there was no evidence of any express promise by them upon the subject, or of any representation respecting the condition of the wine.

Lord ELLENBOROUGH said, he was of opinion that without evidence of an express warranty, or of direct fraud, the action could not be supported, and that the maxim of *caveat emptor* applied to this case.

Plaintiff nonsuited.

Garrow, S.G. and *Abbott*, for the plaintiff.

Park for the Defendant.

[Attornies, *Bovill* and *Hillyard*.]

Where a customer who had bought a quantity of burgundy of excellent quality from a wine merchant, some time after procured him to exchange a portion of it for wine of a different description; —*held*, that there was no implied warranty on the part of the customer as to the state of the wine at the time of the exchange, and that although it had then become quite sour, the wine merchant had no remedy, without proof that the other knew its deteriorated condition and intended to practise a fraud.

Vide Parkinson v. Lee, 2 East. 314.

Tuesday, March 2.

READ v. HUTCHINSON.

Where goods were sold "to be paid for by E.'s bill on P. without recourse on the buyer in case of its not being paid;" although the buyer then knew the bill to be worth nothing, he is not liable to an action of indebitatus assumpsit for the value of the goods.

THIS was an action of indebitatus assumpsit for goods sold and delivered.

The following is a copy of the sale note:

"16 Oct. 1812.

"Sold for account of Mr. James Read,

"To John Hutchinson,

"Seven pipes Guernsey red wine, ex Prince Regent, at £47. per pipe, as they lie in the London dock, To be paid for by Mr. Edward's bill on Mr. P. Young of £328. 12s. due in December next, without recourse on the buyer in case of its not being paid."

The wines were immediately transferred in the London docks to the defendant, and he gave the bill upon Young in payment.

The plaintiff's case was, that this bill was dishonoured when due, and that the defendant at the time of the sale perfectly well knew it was worth nothing, and had deceitfully represented it as an available security. The defendant it was contended was therefore still liable to pay for the goods. Ex parte Dickson, 6 T. R. 142. Ex parte Blackburn, 10 Ves. Jun. 204. Owenson v. Morse, 7 T. R. 64. and Anonymous, 12 Mod. 517. were referred to as in point.

Lord

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Lord ELLENBOROUGH.—I am of opinion this action cannot be maintained. If there be any contract between theſe parties, it is that evidenced by the broker's note; and according to that, the wines were not to be paid in money, but were to be bartered againſt a bill of exchange, and it was expreſsly ſtipulated, that the buyer was not to be liable in caſe the bill ſhould be diſhonoured. Therefore he never was indebted to the plaintiff for the price of the wines, and the law cannot imply a promiſe on his part to pay for them. If the contract is altogether reſcinded, there is no ſale. The defendant is not a purchaſer of the goods, but a perſon who has tortiouſly got poſſeſſion of them. If he knew at the time that the bill was worth nothing, I think he is anſwerable to the plaintiff to the amount of the value of the goods; but this is not the proper remedy. The plaintiff ſhould have brought trover, or an action of deceit.

Plaintiff nonſuited.

Park and *Storks* for the plaintiff.

Garrow for the defendant.

[Attornies, *Saggers* and *Sherwood*.]

Vide Thompſon v. Bond, 1 Campb. 4.

Wednesday, March 3.

ANNETT v. CARSTAIRS and Another.

Where a ship is mortgaged, but the mortgagor continues in poſſeſſion, the maſter employed by him cannot maintain an action for wages and diſburſements againſt the mortgagee.

THIS was an action for the plaintiff's wages and diſburſements as maſter of the ſhip *Airly Caſtle*, of which the defendants were alleged to be the owners.

In Auguſt 1810 *W. Maſſon* was ſole owner of the veſſel in queſtion. At that time he borrowed the ſum of £15,000. from the commiſſioners appointed by an act of parliament to grant loans for the relief of perſons in trade. The defendants became his ſureties to government; and for their indemnification he tranſferred to them (amongſt other things) the legal title to the ſhip *Airly Caſtle*. She was regiſtered in the port of London; but happened then to be at Portſmouth. *Maſſon* executed an abſolute bill of ſale of the veſſel to the defendants, for the nominal conſideration of 10*s*. This was lodged at the cuſtom-houſe, and a few days after, an indorſement was made on the certificate of regiſtry according to the regiſter acts. At the ſame time, a mortgage deed was executed conveying the veſſel to the defendants for their indemnification, and containing a covenant to re-transfer her to *Maſſon*.

The plaintiff had previouſly been employed by *Maſſon* as maſter of the *Airly Caſtle*. He had no direct information of the above tranſaction; but the indorſed certificate of regiſtry was delivered to him,

which ſhewed that the defendants had become the regiſtered owners. He was never introduced to them, or received any orders from them, or had any communication with them reſpecting the concerns of the ſhip. On the contrary, he continued to correſpond with *Maſſon* as his owner. Soon after the transfer he ſailed to the Weſt Indies, and thence to the Havannah, from which he brought home a cargo to England. During the voyage he received *Maſſon*'s inſtructions for his conduct; and on his return he gave the documents for receiving the freight to *Maſſon*, who received it accordingly, and applied it to his own uſe. It was for the plaintiff's wages and diſburſements during this voyage that the action was brought. Soon after the ſhip's return ſhe was broken up as unſerviceable, without having been taken poſſeſſion of by the defendants, who never derived any benefit from her earnings or proceeds.

Garrow, S. G. maintained, that under theſe circumſtances the plaintiff was entitled to recover. The defendants were the legal owners of the ſhip; they were entitled to receive her freight; and they might have diſpoſed of her as they thought fit. They were therefore liable to thoſe who ſupplied her with ſtores, or were employed in navigating her. Could it be doubted that an action might have been ſupported againſt the defendants at the ſuit of a perſon who repaired the ſhip after the transfer by the captain's orders? Such a perſon might unqueſtionably reſort to the legal owners, and was not bound to inquire whether they were mortgagees or truſtees, or were beneficially and excluſively intereſted. If the captain might give an action

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action against the defendants to a ſtranger, he ſurely might maintain one himſelf. The indorſed certificate of regiſtry informed him of the change of title. From the moment of the transfer the defendants muſt be conſidered as his employers, and *Maſſon* was merely their agent.

Lord ELLENBOROUGH.—We are here to conſider, with whom has the plaintiff contracted? There is expreſs privity of contract between him and *Maſſon*. The legal ownerſhip of the ſhip thus becomes immaterial. The transfer of the title to the defendants did not at all affect the relation ſubſiſting between *Maſſon* and the plaintiff. The plaintiff was employed by *Maſſon* originally, and continued to treat him as his employer throughout. What right then can he have to reſort to the defendants? It might as well be ſaid, that if I mortgage my eſtate, my ſteward who continues to manage it for my benefit, may maintain an action for work and labour againſt the mortgagee. Title has nothing to do with theſe caſes. We muſt look to the contract between the parties.

Plaintiff nonſuited.

Garrow, S. G. and *Richardſon* for the plaintiff.

Park, *Abbott*, and *Campbell* for the defendant.

[Attornies, *Sherwood and Crowder & Co.*]

Vide Weſterdell v. Dale, 7 T. R. 306. Young v. Brander, 8 Eaſt. 10. Trewhella v. Rowe, 11 Eaſt. 435. Frazer v. March, 13 Eaſt. 238. 2 Campb. 517.

FOMIN

FOMIN *v.* OSWELL and Another.

Friday, March 5.

THE declaration ſtated that the plaintiff was poſſeſſed of a ſhip called the *Waſſaly*, and divers goods on board her, which he was about to ſend on a voyage from London to Gottenburgh and Peterſburgh; that for the better ſecurity of the ſaid adventure from capture or detention by the enemies of our Lord the King, he intended to cauſe certain ſimulated papers to be put on board the ſaid ſhip, importing her to have ſailed with the ſaid goods from the port of Angro in the Weſtern Iſlands, whereof the defendants had notice; and that in conſideration that he employed them as his agents to procure inſurance to be effected for him of the ſum of £1,500. upon the ſaid ſhip, and £500. upon the ſaid goods, they undertook to procure to be inſerted in the policy or policies of inſurance ſo to be effected, leave for the ſaid ſhip to carry ſuch ſimulated papers. The declaration then alleged, that although the defendants effected the policy, they neglected to procure ſuch leave to be inſerted in it; that the ſhip and goods were captured during the voyage; and that from the ſimulated papers being on board without ſuch leave, the plaintiff was prevented from recovering the ſums inſured from the underwriters. There was another count in the declaration, for omitting to include in the policy the premiums of inſurance and the duties.

Inſurance brokers are not liable to an action for neglecting to inſert in a policy a liberty to carry ſimulated papers, if the written inſtructions given them contain no direction for that purpoſe, although it may have been verbally communicated to them that ſimulated papers were to be uſed in the voyage.

Where a ſhip was condemned for carrying ſimulated papers; and, the policy containing no liberty to do ſo, the aſſured could not recover upon it:—*held*, that an action could not be maintained againſt the inſurance brokers for having neglected to include the premiums and duties, contrary to the inſtructions given them for effecting the policy; as in the reſult the aſſured were not damnified by this neglect.

This is the policy of inſurance mentioned in *Oſwell and another* v. *Vigne*, 15 *Eaſt*, 70. where the Court decided,

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decided, that the aſſured on a policy on ſhip not having leave to carry ſimulated papers, cannot recover for a loſs by capture, if it appear by the ſentence of the foreign prize court, that one of the cauſes ſtated for the condemnation was the carrying of ſimulated papers (*a*).

The defendants were the inſurance brokers who effected the policy, and who brought the former action, averring the intereſt to be in the preſent plaintiff, a Ruſſian ſubject reſident at Peterſburgh.

It was now proved that *E. Pindar*, the captain of the Waſſily, had firſt ſome verbal converſation with the defendants concerning the inſurance, in which he informed them he was to carry ſimulated papers. He afterwards ſent them the following written inſtructions:

" Meſſrs. Oſwell & Selby.

" Gentlemen,

" In a late converſation on the ſubject of effecting " inſurance on my ſhip, and the refunding £600. " which I had paid into the hands of Mr. Selby " through Mr. Biſhop, in which you were kind " enough to acquieſce. In conſequence whereof, " wait on you with the particulars of inſurance of " £1,500. on the brig Waſſaly, formerly the Elbe " of Hull, George Weyer, maſter, from London to " Gottenburgh and St. Peterſburgh, with or without " convoy, againſt the dangers of the ſeas, enemies, &c. —" £500. on goods, Do. Do.

(*a*) See alſo Horneyer v. Luſhington, 15 Eaſt. 46.

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—" £600. on the ſaid brig againſt ſeizure after her " arrival at Pruſſian port.

—" £2,600.—This ſum to be inſured *with pre-* " *miums and duties*, by which you will oblige,

" Yours, &c."

" London, 21 April 1810."

Topping, for the plaintiff, contended, that the brokers were clearly bound to inſert a clauſe in the policy, giving leave to carry ſimulated papers; and as they had diſobeyed poſitive inſtructions to include the premiums and duties, they muſt make good the loſs on this ſcore, which amounted to £350.

Lord ELLENBOROUGH.—I do not think the defendants are liable on the firſt ground, as the written inſtructions are ſilent concerning ſimulated papers. Notwithſtanding the prior converſation, the captain might have reſolved not to carry any; and if he was to carry them, it did not follow that he wiſhed a leave for this purpoſe to be inſerted in the policy, having ſaid nothing upon the ſubject when he gave the particulars of the inſurance.—For omitting to include the premiums, the defendants would certainly be liable if the plaintiff had thereby ſuſtained any damage; but the Court has decided that he was not entitled to recover upon the policy, and he would not have been in a better ſituation if the premiums had been included. As to the firſt complaint, there is a loſs without an injury; as to the ſecond, there is an injury without a loſs. I am therefore of opinion, that on neither ground can the action be maintained.

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The plaintiff, however, recovered a verdict for a balance of £4, admitted to be due to him upon an account rendered by the defendants.

Topping and *Marryat* for the plaintiff.

Garrow, S. G. and *Park* for the defendant.

[Attornies, *Michell* and *Gregson*.]

Vide Wilkinson v. Coverdale, 1 Esp. Rep. 74. Webster v. De Tastet, 7 T. R. 157. Comber v. Anderson, 1 Campb. 523.

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER.

Tuesday, Feb. 16.

BISHOP AND OTHERS v. WARE.

The master of a ship has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side.

THIS was an action on the case for not delivering goods according to a bill of lading,—with a count in trover.

The plaintiffs shipped at Hull, on board a vessel belonging to the defendant, a package of files, to be carried to London. The bill of lading was in the usual form, stating that the goods were to be delivered on payment of freight. When the vessel had arrived,

and was moored off Cuſtom-houſe Quay, the plaintiffs ſent a barge for their goods, which they required to be put over the ſhip's ſide into the barge, at the ſame time tendering the freight. The captain inſiſted upon his right to wharfage as well as freight, and refuſed to deliver up the goods till the wharfage was paid.

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It was now proved, by way of defence to the action, that when goods are put over the ſhip's ſide after ſhe is moored at the wharf, half wharfage is uſually paid by the conſignee,—which was contended to be a reaſonable demand, as the goods derive a benefit from the ſhip being moored at the wharf, although they are not actually landed there.

Sir JAMES MANSFIELD.—If the goods are not landed, a compenſation muſt be made for the benefit derived from the wharf, by the owner of the ſhip. The goods cannot be ſubjected to this charge, more than to many others which are incurred by the ſhip in the courſe of the voyage. According to the bill of lading, the goods in queſtion were to be delivered on payment of freight. The defendant, therefore, could have no right to detain them for wharfage.

The plaintiffs had a verdict.

Shepherd, Vaughan, (Serjts.) and *Brougham*, for the plaintiffs.

Beſt and *Pell*, Serjts. for the defendant.

Vide Syeds v. Hay, 4 T. R. 260.

SITTINGS AT GUILDHALL.

Coram GIBBS, J.

Tuesday, Feb. 23.

KERRISON *v.* COOKE.

Where, upon an accommodation bill becoming due, it was presented for payment to the acceptor, and he promised to pay it;—*held*, that he was not discharged by time being afterwards given, without his consent, to the drawer by the indorsee, who knew that it had been accepted for the drawer's accommodation.

THIS was an action against the acceptor of a bill of exchange, drawn by J. S., payable to his own order, and indorsed by him to the plaintiffs.

The defence was, that the bill had been accepted merely for the accommodation of J. S.; that the plaintiff was aware of this circumstance; and that upon the bill becoming due, he gave time to J. S., without the concurrence of the defendant. *Laxton* v. *Peat*, 2 *Campb.* 185. was cited as in point.

The facts relied upon were proved; but it further appeared, that when the bill became due, the plaintiff presented it for payment to the defendant, who promised to pay it.

GIBBS, J.—Admitting *Laxton* v. *Peat* to be law, of which grave doubts have been entertained, the present case may be distinguished from it. Lord ELLENBOROUGH's decision there proceeded upon the ground that the drawer, according to the understanding of the different parties to the bill, was considered as primarily

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liable, and was in the firſt inſtance looked to for payment. But here, payment is demanded of the acceptor when the bill becomes due, and he then promiſes to pay it. This ſhews that he was held liable as in the common caſe of the acceptor of a bill of exchange; and I am of opinion that he was not diſcharged by time given under theſe circumſtances to the drawer. I am ſorry the term *accommodation bill* ever found its way into the law, or that parties were allowed to get rid of the obligations they profeſs to contract by putting their names to negotiable ſecurities.

The plaintiff had a verdict.

Beſt, Serjt. and *Tancred* for the plaintiff.

Shepherd, Serjt. and *Selwyn*, for the defendant.

Vide Collott *v.* Haigh *ante* 281.

COOPER AND ANOTHER *v.* GIBBONS.

Wedneſday, Feb. 24.

THIS was an action for the value of a pipe of wine; and the queſtion was, whether it had been ſold by the plaintiffs to the defendant and one *Robertſon* deceaſed jointly, or the credit had been given to *Robertſon* excluſively.

If upon a notice to produce books of account, they are not produced, this circumſtance affords no legal ground for any inference reſpecting their contents, and merely entitles the oppoſite party to prove their contents by parol evidence.

The plaintiffs proved that the wine had been delivered at a houſe in which the defendant and *Robertſon*, who were partners in trade, were living together.

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The circumſtance chiefly relied upon by the defendant was, that notice had been given to produce the plaintiffs' books containing any entry of this ſale, and that they were not produced.

Vaughan, Serjt. for the defendant, inſiſted, that the jury were bound to infer that *Robertſon* alone was debited with the price of the wine, and that the ſale had been excluſively to him.

GIBBS, J.—I have conſidered this ſubject a good deal, and I am of opinion that the jury are not authorized to draw any ſuch inference from the circumſtance relied upon. The non-production of the plaintiffs' books, after a notice to produce them, merely entitles the defendant to give parol evidence of their contents.

The plaintiffs had a verdict.

Beſt, Serjt. and *Gaſelee*, for the plaintiffs.

Vaughan, Serjt. for the defendant.

OXFORD CIRCUIT.

LENT ASSIZES, 53 GEORGE III.

WORCESTER.

Coram BAYLEY, J.

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Monday, March 8.

SKEYE *v.* VOYCE.

At the assizes, if business is not begun on the commission day, causes must be entered with the marshal before the sitting of the court on the first day of business.

SATURDAY, March 6, was the commission day at Worcester. The Judges arrived in the evening and opened the commission in the usual form.

This morning at nine o'clock the Nisi Prius Court sat for the dispatch of business. About half an hour after, *Dauncey* moved, that the judge's marshal should be directed to receive a record, and enter the cause for trial; and he contended, that till 12 o'clock, this might be insisted upon as a matter of right.

BAYLEY, J.—The plaintiff has no right to have his cause entered after the sitting of the court this morning. Where business is not done upon the commission day, causes must be entered before the court sits on the day when business is begun. I had occasion to state this

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rule the laſt time I ſat here. It is the rule of all the circuits; and I wiſh it were generally known. If from miſtake, or any ſpecial circumſtances, a cauſe has not been entered in time, I will liſten to an application for leave to enter it; but after the ſitting of the court, the marſhal has no authority to receive the record and enter the cauſe, without an order being made for that purpoſe.

Barnes for the defendant.

Vide R. G. H. 14 Geo. II. K. B. and C. P.

Tueſday, March 9.

HODGES *v.* HOLDER.

In treſpaſs quare clauſum fregit, if the defendant pleads—as to coming with force and arms and whatſoever elſe is againſt the peace, *not guilty*, and as to the reſidue of the treſpaſſes, a juſtification, which is denied by the replication; at the trial he has a right to begin and to have the general reply.

DECLARATION in the uſual form for breaking and entering plaintiff's cloſes, and with horſes and carriages treading down the graſs and ſubverting the ſoil, &c. The defendant pleaded—as to coming with force and arms, and whatever elſe was againſt the peace of our lord the King, *Not Guilty;* and as to the reſidue of the treſpaſſes, a right of way; which was traverſed by the replication, and thereupon iſſue was joined.

The pleadings being opened, a queſtion aroſe which party ſhould begin. This right was claimed for the defendant, as he did not deny the treſpaſſes and was bound to make out his juſtification. For the plaintiff, it was contended, on the other hand, that *Not Guilty* having been pleaded to part of the declaration, the iſſue lay upon him.

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BAYLEY, J. held, that this plea of *not guilty as to force and arms*, was not a general iſſue; and that as it did not throw the neceſſity of any proof on the plaintiff, the defendant ought to begin.

This courſe was accordingly purſued. The defendant's witneſſes were examined firſt, to prove the right of way, and the plaintiff having afterwards called witneſſes to diſprove it, the defendant's counſel had the general reply.

Verdict for the defendant.

Jervis, *Peake*, and *Puller*, for the plaintiff.

Dauncey, *Abbott*, and *Taunton*, for the defendant.

Vide Doe d. Corbett v. Corbett, next caſe.

SHREWSBURY.

Coram BAYLEY, J.

Friday, March 19.

DOE d. Sir RICHARD CORBETT, Bart. v. CORBETT, Clerk.

In ejectment, where the leſſor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the queſtion between them, the defendant on admitting the title of the leſſor of the plaintiff under the will, has a right to begin and to have the general reply.

THIS was an ejectment for the manor of *Langnor* and various other eſtates in the county of Salop.

The leſſor of the plaintiff claimed under the will of Sir Richard Corbett, Bart. deceaſed, made in the year 1764; the defendant, under a codicil to the ſame will made in the year 1771. This codicil was impeached by the leſſor of the plaintiff, on the ground that when it was executed the teſtator had fallen into a ſtate of dotage, and that undue influence had been exerciſed over his mind.

The pleadings being opened, the defendant's counſel ſaid, they admitted the title of the leſſor of the plaintiff under the will, and claimed the right of firſt proving their caſe and having the general reply. *Goodtitle on the demiſe of Revett* v. *Braham*, 4 T. R. 496. was cited as in point, where upon a trial at bar it was decided that the defendant in ejectment is entitled to the general reply, where the plaintiff claiming by deſcent proves his pedigree and ſtops, and the defendant

defendant ſets up a new caſe in his defence, which is anſwered by evidence on the part of the plaintiff.

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On the other ſide, they denied the application of this rule, where both the contending parties claim as deviſees under the ſame teſtator.

Bayley, J.—I think the principle is the ſame in both caſes. The deviſee named in the codicil ſtands in the ſame relation to the deviſee named in the will, as the deviſee named in the will does to the heir at law. Between the two latter, the queſtion turns upon the validity of the will, and the party who has to eſtabliſh it, has been held to be entitled to the general reply. I conceive, therefore, that the ſame privilege ſhould be allowed to the party who has to eſtabliſh the validity of the codicil.

The defendant accordingly began, and proved ſo very ſtrong a caſe in ſupport of the codicil, that the counſel on the other ſide declined offering any evidence.

Jervis, *Taunton*, *Puller*, and *Campbell*, for the leſſor of the plaintiff.

Dauncey, *Hart*, *Abbott*, and *Petit*, for the defendant.

Vide Hodges v. Holder, *ante* 366.

GLOCESTER.

Coram BAYLEY, J.

Monday, April 5.

REX v. JACKSON and Another.

It is an indictable offence, fraudulently to obtain goods, by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.

THIS was an indictment on 30 Geo. 2. c. 24. for obtaining goods on false pretences.

The prosecutor was a jeweller at Cheltenham, who was defrauded of goods to a considerable value by the defendants. Among other things, for the purpose of deceiving him, they gave him in payment of the goods a cheque upon *Wright & Co., Bankers, in Henrietta Street, Covent Garden*,—with whom it was proved they kept no cash and had no account.

Ludlow, for the defendants, contended, that as far as the cheque was concerned, they were not criminally liable; and cited *Rex* v. *Lara*, 6 T. R. 565. in which it was held, that an indictment could not be supported against a person for delivering a draft on a banker, which he knew he had no authority to draw, and would not be paid; whereby he obtained possession of certain lottery tickets, and defrauded the prosecutor of the value.

BAYLEY, J.—This point has recently been before the Judges; and they were all of opinion, that it is an indictable

indictable offence, fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.

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The defendants were convicted, and sentenced to seven years transportation.

Hughes and *Harris* for the prosecution.

Ludlow for the defendant.

In *Rex* v. *Lara*, the indictment was at common law. *Vide* 2 East. P. C. c. 18. s. 8, 9.

REX *v.* MARY COLE.

Thursday, April 8.

A woman tried on the coroner's inquest for the murder of her bastard child, may be found guilty under 43 G. 3. c. 58. s. 4. of endeavouring to conceal the birth.

THE prisoner stood charged on the coroner's inquisition with the murder of her bastard child. A bill against her for the same offence had been thrown out by the grand jury. There was no evidence to convict her of the murder; and the only question was, whether she could be found guilty of the concealment.

Campbell, for the prisoner, contended, that Lord ELLENBOROUGH'S act, 43 Geo. 3. c. 58. s. 4. authorizes the jury to find the prisoner guilty of endeavouring to conceal the birth of the child, only where she is *indicted* for the murder, and does not apply to a case where she is tried on the coroner's inquest, the bill for the murder having been thrown out by the grand jury.

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v.
Mary Cole.

Bayley, J.—That point was ſubmitted to the Judges in a caſe from the Home Circuit tried before the Lord Chief Baron; and they were all of opinion that the priſoner may be found guilty of the concealment, whether charged with the murder by the coroner's inquiſition or a bill of indictment returned by the grand jury.

The priſoner was found guilty of the concealment, and ſentenced to four months impriſonment.

Ludlow for the proſecution.

Thurſday, April 8.

Panton, Widow, *v.* Jones.

If the occupier of a houſe ſubmits to a diſtreſs for rent ſtated in the notice of diſtreſs to be due from him as tenant to the diſtrainer, this is an acknowledgment of the tenancy.

THIS was an action for the uſe and occupation of a houſe at Briſtol.

The defendant had never paid rent perſonally to the plaintiff, and ſhe did not give ſtrict evidence of title; but it was proved, that in January 1811, the defendant being in poſſeſſion of the premiſes, ſhe diſtrained on his goods for £39. 18 *s.* ſtated to be arrears of rent then due from him to her as his landlady. He did not replevy, and the goods were ſold to ſatisfy the rent.

Ludlow, for the defendant, contended, that the diſtreſs was no acknowledgment of a tenancy by the party ſubmitting to it. Although he knew the plaintiff had no right to diſtrain, he might not be in a ſituation to

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replevy his goods, or he might think it preferable to bring an action of treſpaſs, the time for which had not yet expired.

BAYLEY, J.—I have no doubt that ſubmitting to a diſtreſs acknowledges the tenancy. The landlord, after diſtraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord.

The plaintiff recovered.

Abbott for the plaintiff.

Vide Co. Litt. 212 b. Green's Caſe, Cro. Eliz. 3; Zouch d. Ward v. Willingale, 1 H. Bl. 311.

ADJOURNED SITTINGS AT GUILDHALL.

Before Easter Term,

53 GEORGE III.

Monday, April 12.

BILKE, Esq. *v.* HAVELOCK.

The sheriff cannot maintain an action for the expence incurred in seizing and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons.

INDEBITATUS assumpsit for work and labour by the plaintiff and his servants and bailiffs, in executing a writ of *testatum fieri facias*, directed to him as sheriff of the county of Surrey.

Garrow, S.G., in opening the case, stated, that while *Mr. Bilke* was high sheriff of Surrey, *Mr. Havelock* sued out a *testatum fieri facias* into that county, in an action in which he was plaintiff against two persons of the names of *Geddes* and *Milligban*. A warrant being made out under this, the officers, by *Mr. Havelock*'s directions, seized a ship as the property of *Geddes* and *Milligban*. A claim, however, was put in by another party, and they afterwards became bankrupt. The sheriff required an indemnity before proceeding to a sale; Mr. *Havelock* refused to give one, but required the officers to remain in possession of the ship. They did so for more than two years, and thereby an expence was incurred of between £300. and £400.

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No goods were sold under the writ. It was now contended, that as the sheriff received no poundage, and had actually laid out the money at the defendant's requeſt and for the defendant's benefit, the law would raiſe a promiſe to make him a reaſonable compenſation.

Lord ELLENBOROUGH.—The law knows of no promiſe to pay the ſheriff for executing the King's writ. Such an action as this never was heard of in Weſtminſter-Hall. It is the duty of the ſheriff under a writ of *fieri facias* to ſeize the goods in his bailiwick belonging to the defendant. If he is in doubt as to the property, he may impannel a jury for his own protection. If the goods are ſold, he receives in poundage the ſpecific recompence for his trouble which the law has provided. He is entitled to none for ſeizing and remaining in poſſeſſion of goods belonging to a ſtranger. The office of ſheriff would become a very lucrative one, if he could maintain an action for every ineffectual attempt by his officers to execute a writ.

Garrow then ſtated, that the preſent defendant had acknowledged the ſheriff's right to be reimburſed for the expence of keeping poſſeſſion of this ſhip by having paid him a ſum of £30. on account.

Lord ELLENBOROUGH.—The ſheriff may be very well pleaſed if an action is not brought againſt him to recover that money back.

Plaintiff nonſuited.

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Garrow, S. G. and *Marryat*, for the plaintiff.

Park, for the defendant.

[Attornies, *Bevan* and *Meggison*.]

Vide Morris v. Burdett, 1 Campb. 218. and Wathew v. Sandys, 2 Campb. 640.

Tuesday, April 13.

WIENHOLT v. SPITTA and Others.

If a cheque is given on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop the payment of the cheque.

ACTION on a banker's cheque drawn by the defendants for the sum of £532.

A house in Westphalia having received a sum of money on account of the plaintiff, directed the defendants, who are their correspondents in London, to pay it to him, but said they could not allow him interest upon it, as they had made none themselves. This being communicated to the plaintiff, he at first insisted on interest; but finally agreed, on having a cheque for the principal, to give a receipt in full. He accordingly wrote such a receipt, and received the cheque in question in exchange. Having got it into his hands, he said he should prosecute the house abroad for interest before the Chamber of Commerce at Paris. The defendants thereupon ordered payment of the cheque to be stopped.

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Lord ELLENBOROUGH.—If I give a draft upon a condition, and I find the condition is to be eluded, I may ſtop the payment. This was a conditional delivery of the draft. When it was delivered, all ſtill remained in *fieri*. The defendants on diſcovering the plaintiff's intentions were fully juſtified in reſiſting the demand. The draft in his hands had become a piece of waſte paper.

Plaintiff nonſuited.

Scarlett and *Barnewall* for the plaintiff.

Garrow, S. G. and *Park* for the defendants.

[Attornies, *Blunt* and *Kaye*.]

HAGEDORN *v.* REID.

Thurſday, April 15.

POLICY, dated 2d Auguſt 1810, on the ſhip Fieſco, at and from Gluckſtadt, and any port or ports in the river Elbe, to any port or ports in the United Kingdom.

A licence to *A.B. on behalf of himſelf and other Britiſh or neutral merchants*, to import a cargo in a veſſel bearing any flag except the French, will legalize a policy of inſurance on a ſhip belonging to an alien enemy employed for this purpoſe, if the cargo is proved to belong to *Britiſh or neutral merchants*; but not otherwiſe.

The intereſt was laid in one *Schroder*. The ſhip was captured, and the only queſtion was, whether the inſurance was legalized.

Gluckſtadt is a port under the dominion of Denmark, with whom we were then at war, and *Schroder* the owner of the ſhip reſided there. A copy of a licence

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was produced, dated 2d June 1810, and granted to "J. H. P. Hagedorn of London, on behalf of himſelf and other Britiſh or neutral merchants," permitting a veſſel bearing any flag except the French to proceed with a cargo from any port within certain limits comprehending the river Elbe, to any port of the United Kingdom.

The original licence was tranſmitted to one *Doorman*, a merchant at Hamburgh, which city was then in a ſtate of neutrality. He was ſtated to have ordered the ſhipment of the goods; but there was no legal evidence that they belonged to him or any other Britiſh or neutral merchant.

Lord ELLENBOROUGH.—Had the cargo been proved to be the property of any Britiſh or neutral merchants, by whom or on whoſe account the licence was taken out, I think that licence would have protected the ſhip of an alien enemy during the adventure. The importers muſt be Britiſh or neutral merchants; but the ſhip might bear any flag except the French. Government therefore ſeems to have contemplated that it might be neceſſary to employ a ſhip belonging to an alien enemy, and to have authorized that act,—ſo that ſhe was not French. Some evidence however is neceſſary, that the cargo belonged to Britiſh or neutral merchants. Though the licence would legalize the means of the importation, you muſt ſhew that the importers were of the deſcription which the licence ſpecifies. The condition on which it was granted muſt be proved to have been fulfilled. I cannot preſume that goods loaded in a hoſtile port were not enemy's

property, merely becauſe the licence for the voyage was tranſmitted to a neutral.

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Plaintiff nonſuited.

Note.—The following was the evidence of the licence being ſent to *Doorman*. It was proved to be the invariable courſe of the plaintiff's office, that the clerk who copies any licence ſends it off by the poſt, and makes a memorandum on the copy of his having done ſo: a copy of the licence in queſtion was produced from the plaintiff's letter-book, in the hand-writing of one *Munday*, a deceaſed clerk, with a memorandum written on it by him, ſtating that the original had been ſent to *Doorman*; and a witneſs acquainted with the plaintiff's mode of tranſacting buſineſs ſwore, that he had no doubt the original was ſent according to the ſtatement in the memorandum.—*Munday* being dead, Lord ELLENBOROUGH held this to be ſufficient.

Entry of the deceaſed clerk of a merchant in the letter book, received in evidence, on proof that it was made in the uſual courſe of buſineſs in the merchant's counting houſe.

Garrow, S. G., *Park*, and *Taddy*, for the plaintiff.

Topping and *Scarlett*, for the defendant.

[Attornies, *Kaye & Co.* and *Palmer & Co.*]

Vide Doe d. Reece v. Robſon, 15 Eaſt, 32. Pritt v. Fairclough, ante, 305.

Thurſday, April 15.

FORRESTER and another *v.* PIGOU.

An underwriter who pays on a promiſe of repayment if the policy be determined to be invalid, is not a competent witneſs for another underwriter who diſputes the loſs.

Aliter, if the promiſe of repayment had been made after he had paid unconditionally, or if the plaintiff had fraudulently entered into the agreement with him for the purpoſe of taking off his teſtimony.

THIS was an action on a policy of inſurance. The defence was, that there had been a concealment from the underwriters of a letter, containing material information reſpecting the failing of the ſhip.

To ſupport this, a gentleman of the name of *Gregory* was called, who being examined on the *voire dire* ſtated, that he was an underwriter on the ſame policy; that he adjuſted and paid an average of £60. per cent. without any thing particular paſſing; that he was afterwards called upon for a further payment of £16. per cent.; that looking at the policy, he then aſked the plaintiffs, how it happened that only himſelf and two others had ſettled; that the plaintiffs ſaid, the reſt of the underwriters diſputed the loſs, but if he would pay the £16. per cent. he ſhould be placed exactly in the ſame ſituation with them, ſhould the policy turn out to be invalid; that he thereupon paid the £16. per cent.; and that he had no doubt he ſhould recover back the whole of his money if the defendant ſucceeded in the preſent action.

It was inſiſted, that under theſe circumſtances Mr. *Gregory* was a competent witneſs, as the defendant had a right to his teſtimony, which could not be taken away by any tranſaction between him and the plaintiff after the action had been commenced. If the law were otherwiſe, it would be in the power of every plaintiff

to

to disqualify every witness of whose evidence he is afraid.

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Lord ELLENBOROUGH.—A subsequent promise to repay money to the witness which he had paid unconditionally, would not render him incompetent, as the promise could not be enforced, and he could only entertain the expectation of a benefit (*a*). Nor would the witness be disqualified by any agreement fraudulently entered into between him and the plaintiff, for the purpose of taking off his testimony. But the pendency of a suit cannot prevent third persons from transacting business *bonâ fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested cannot be examined as a witness for that party from whose success he will necessarily derive an advantage. Here, there appears to have been no fraudulent purpose to render the witness incompetent, and there is a legal obligation on the plaintiffs to repay him, at least the £16. per cent., should there be a verdict for the defendant.

The plaintiff recovered.

Garrow, S. G., *Marryat*, and *Gaselee*, for the plaintiffs.

Park, *Topping*, and *Richardson*, for the defendant.

[Attornies, *Gregson & Co.* and *Kaye & Co.*]

(*a*) Bilbie v. Lumley, 2 East, 469. Rudd's Case, Leach, C. C. 151. Gilb. Law Ev. 124.

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But though an intereſt acquired bonâ fide in the courſe of buſineſs, ſubſequent to the event to be proved, diſqualifies a witneſs; if a perſon acquainted with the facts of a cauſe lays a wager upon the verdict, or a proſecutor bets that he ſhall convict the defendant, their competency to give evidence is not thereby deſtroyed. Barlow v. Vowell, Skin. 586. Rex v. Fox, 1 Stra. 652.

Saturday, April 17.

CLAPHAM and another, Aſſignees of PEARCE a Bankrupt, *v.* COLOGAN.

Inſuring a ſhip by *an Engliſh name* does not amount to a warranty, or a repreſentation, that ſhe is *an Engliſh ſhip*

A policy "at and from A. and B." is not vitiated by inſerting, without the conſent of the underwriters, the words, "both or either."

THIS was an action on a policy of inſurance on goods. One count of the declaration ſtated the ſhip to be "the Three Siſters, at and from Cadiz and Seville to Liverpool," and another count, "the *Tres Hermanas, or* Three Siſters, at and from Cadiz and Seville, *both or either*, to Liverpool."

The policy was originally filled up "on the Three Siſters, at and from Cadiz and Seville to Liverpool." After it had been ſigned by the underwriters, the broker inſerted the words "Tres Hermanas or," and "both or either." Several of the underwriters put their initials to the alteration; but the defendant refuſed to do ſo. When the broker effected the policy he merely called the ſhip "the Three Siſters," without making any repreſentation as to the country ſhe belonged to. In point of fact, ſhe was originally a Dane, and was purchaſed by the bankrupt, a merchant at Liverpool. While at Seville on the adventure in queſtion, he changed her name to the *Tres Hermanas*, manned her with a Spaniſh crew commanded by a Spaniſh

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Spaniſh captain, and put her under the Spaniſh flag. —She was loſt on the voyage home by the perils of the ſea.

On the part of the underwriters, it was ſworn, that if the ſhip, inſtead of being Engliſh, as her name in the policy denoted, had been known to be manned with Spaniſh ſeamen, and navigated as a Spaniard, it would have made a difference of two per cent. in the premium.

Lord ELLENBOROUGH, however, held, that under theſe circumſtances the defendant was liable. The mere calling the ſhip by an Engliſh name, he ſaid, could not amount to a warranty or repreſentation that ſhe was Engliſh; ſhe might have been an American, or an Engliſh prize preſerving her original name, or a ſhip built on the continent, whoſe name was tranſlated into Engliſh. Suppoſe a ſhip were inſured by the name of *the Mark Anthony*, if there was no repreſentation of her country, it would be too much to ſay, the policy would be void, ſhould ſhe turn out to be an Italian called "Il Marco Antonio." If the premium would be governed by the ſhip's nationality, the underwriters muſt aſk for information; they muſt not truſt to the name (*a*). No harm, therefore, could be done by inſerting the *Tres Hermanas* in the policy, that being a mere tranſlation of the *Three Siſters*. So the other alteration could not vitiate the policy, being in an immaterial part. Without the words "both or

(*a*) *Vide* Lothian v. Henderſon, 3 B. & P. 499. Le Meſurier v. Vaughan, 6 Eaſt, 382.

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CLAPHAM and another, Assignees of PEARCE a Bankrupt, v. COLOGAN.

either," the ship had the option of going both to Cadiz and Seville or not as it might suit the exigencies of the adventure, so that if she went to both she took them in their proper order;—and with the insertion, she still would have enjoyed the liberty under the same limitation. The legal operation of the instrument therefore is in no degree affected (*b*).

Verdict for the plaintiffs.

Garrow, S. G., *Park*, and *Puller*, for the plaintiffs.

Park, *Scarlett*, and *Campbell*, for the defendant.

[Attornies, *Crowder* and *Blunt*.]

(*b*) *Vide* Marson v. Petit, 1 Campb. 82. n.

[This cauſe was tried at the Sittings in laſt Hilary Term.]

SHADFORTH *v.* HIGGIN.

ASSUMPSIT upon the following agreement ſigned by the plaintiff and defendant:

Where a ſhip was freighted to go in ballaſt to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her, in time for the July convoy provided ſhe arrived out and was ready by the 25 June;—*held*, that as ſhe did not arrive out till after the 25 June the freighter was entirely diſcharged from his contract to furniſh a cargo.

"James Shadforth, part owner of the ſhip Fanny "of 300 tons, coppered and armed, agrees to diſpatch "ſaid veſſel immediately in ballaſt direct to Jamaica, "and on her arrival at Rio Nova Bay, Salt Gut, and "St. Ann's, receive a full and complete cargo of pro- "duce, conſiſting of ſugar, rum, coffee, and pimento. "In return Meſſrs. Higgin and Co. agree to provide "a cargo at the above ſhipping places, to be taken on "board in the uſual manner, in time for July convoy, "*provided ſhe arrives out and ready by the 25th of* "*June*, and the freight to be at the current rate as "given to other veſſels loading at the ſame time and "ſame ports."

The declaration alleged, that the defendants did immediately diſpatch the veſſel in ballaſt to Jamaica, and that on her arrival at Rio Nova Bay ſhe was afterwards, to wit, on the 3d of July, and from thence for a long ſpace of time, to wit, for the ſpace of three months from thence next enſuing, ready to receive at Rio Nova Bay, Salt Gut, and St. Ann's aforeſaid, a full and complete cargo of produce, according to the form and effect of the ſaid agreement; yet that the defendant did not nor would provide a cargo for the

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said vessel at the above shipping places, or any or either of them, according to the form and effect of the said agreement, whereby the said ship was obliged to return from Jamaica without any cargo being loaded on board thereof.

The ship in point of fact did not reach Jamaica till the 3d of July; and the question was, whether under these circumstances the defendant was answerable for having failed to furnish her with a full cargo.

Garrow, S. G., for the plaintiff, contended, that the defendant was bound to furnish a full cargo for the ship at all events. Provided she arrived out and was ready by the 25th June, this was to be done in time to enable her to sail with the July convoy. The condition of her arriving by 25th June only applied to the time of her departure on the homeward voyage. If by any acident her arrival was delayed beyond the day specified, she was still entitled to a cargo in a reasonable time, as if the proviso and the mention of the July convoy had not been introduced into the agreement. It could hardly be meant, that where the owner was absolutely bound to dispatch his ship to Jamaica, if she arrived a day later than was expected, the freighter might send her home empty.

Lord ELLENBOROUGH.—I think the arrival of the ship by the 25th June was a condition precedent. The freighter might know, that if she arrived by that day he could easily provide a cargo for her; but that afterwards it might be impossible. He might have had goods of his own, which it was essentially necessary should be shipped by that day, and which he was therefore

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therefore compelled to load on board another veſſel. It would be a great hardſhip upon the freighter if he were bound to provide a freight for a veſſel which arrives at a ſeaſon of the year when there is no produce ready for ſhipping in the iſland. If the freighter is liable, although the ſhip does not arrive till a week after the day agreed upon, where is the line to be drawn? I think the fair interpretation of the inſtrument is, that unleſs the ſhip arrived by the 25th June, the defendant's liability was to be at an end.

The plaintiff likewiſe failed in eſtabliſhing another agreement declared upon for the loading of the ſhip, and ſubmitted to be nonſuited.

Garrow, S. G., *Abbott*, and *Campbell*, for the plaintiff.

Park, *Topping*, and *Marryat*, for the defendant.

[Attornies, *Nind* and *Sudlow*.]

Where, however, the default of which the freighter complains, does not go to the whole conſideration for his contract, and he has derived ſome benefit from the uſe of the ſhip, the covenant broken on the part of the ſhip owner is not to be conſidered as a condition precedent, but as a diſtinct covenant, for the breach of which the party injured may be compenſated in damages. Therefore, if the voyage has been performed, it is no defence to an action for the ſtipulated freight, to ſhew the breach of a covenant to ſail *with the firſt wind*, (Conſtable v. Cloberie, Palm. 397.)—or to ſail *direct* to the port of deſtination, (Bornman v. Tooke, 1 Campb. 377.)—or to ſail *with the firſt convoy* on the intended voyage, (Davidſon v. Gwynne, 12 Eaſt, 381.)—or that the ſhip ſhould *forthwith* be made tight and ſtaunch, (Havelock v. Geddes, 10 Eaſt, 555.)—or that the maſter ſhould take on board *a full and complete cargo*, (Ritchie v. Atkinſon, 10 Eaſt, 295.)

Saturday, March 6th.

BEAURAIN Gent. *v.* Right Hon. Sir W. SCOTT.

An action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order.

The practice of the ecclesiastical court is matter of fact to be proved by evidence, and left to the jury.

THIS was an action on the case, for unlawfully excommunicating the plaintiff.

The declaration stated, that at the time of committing the grievance complained of, the defendant was Vicar General and Official Principal of the Consistorial and Episcopal Court of *Beilby*, by divine permission then Lord Bishop of London; that the plaintiff was a person of good fame, and a practising attorney; that a cause of separation from bed and board and mutual cohabitation was then depending in the said Court, in which a minor son of the plaintiff was cited to appear before the defendant, to answer *Anne Beaurain* his lawful wife in the said cause, but to which the plaintiff was no party; yet that the defendant required the plaintiff to take upon himself, the burthen of guardian to his said infant son, and appear in such suit as guardian *ad litem*; which burthen the plaintiff wholly refused to take upon himself, as he lawfully might; that the defendant afterwards signed with his name and published a certain instrument, purporting to be a schedule of excommunication; by which said instrument the said defendant, as Vicar General of the said Bishop of London, and Official Principal of his Consistorial and Episcopal Court, pretending to be armed with legal authority, and pretending that justice so required, unjustly and unlawfully decreed the said plaintiff to be excommunicated for certain alleged

contempts

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contempts and contumacy in not appearing at a certain day and place as the guardian aſſigned to his ſaid infant ſon; whereas the plaintiff was not legally appointed the guardian *ad litem* for his ſaid ſon; that the ſaid ſchedule of excommunication was ſigned and publiſhed without the plaintiff's having been ſerved with any citation, monition, decree, or legal notice whatſoever to take upon himſelf the burthen of the ſaid guardianſhip; that ſuch excommunication was afterwards read during divine ſervice in the pariſh-church of St. Botolph, Biſhopſgate, the ſame being the pariſh where the plaintiff reſided; and he was then and there openly and publicly declared and denounced excommunicated by the miniſter of the ſaid pariſh; by means whereof the plaintiff had ſuffered in his good name, been injured in his profeſſion, ſued by his creditors, and reduced with his family to great diſtreſs, poverty, and ruin.—Plea, the General Iſſue.

It appeared that Sir WILLIAM SCOTT, as Vicar General and Official Principal of the Conſiſtorial Court of the Biſhop of London, had required the plaintiff to appear as guardian *ad litem* to his ſon; and ordered him to be excommunicated for refuſing to do ſo. On appeal to Sir JOHN NICHOLL, as Dean of the Arches, that learned judge held that Mr. *Beaurain* was compellable to become guardian *ad litem* to his ſon, and that the excommunication was regular. The matter being referred back to the Conſiſtorial Court, the ſchedule of excommunication iſſued, and was publiſhed in the pariſh church of St. Botolph, Biſhopſgate.

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The plaintiff's counsel contended, that the action was maintainable on two grounds: 1st, Because the Ecclesiastical Court had no authority to compel Mr. *Beaurain* to become guardian to his son against his will, but ought either to have appointed one of its own officers guardian, as is done in the courts of equity, or allowed a guardian to be appointed by the plaintiff in the suit, as is done in the courts of common law; and 2dly, Because no regular citation or monition had been served upon Mr. *Beaurain* before the excommunication was directed. It was allowed that he had previously made an affidavit in the suit respecting the appointment of a guardian, and that he had verbal notice of the order to appear as guardian; but it was insisted, that till a regular citation or monition was served upon him, he was not properly before the Court, and the Judge could have no authority to proceed to excommunication.

On the other side, they did not deny that the action might be maintained if the Ecclesiastical Court had exceeded its jurisdiction; but they called witnesses to prove that the plaintiff was bound to become guardian for his son, and that the proceedings against him were perfectly regular.—Among these was Sir JOHN NICHOLL, who stated, that he continued of the same opinion as when he dismissed the appeal.—It was proved that the plaintiff might have done all that was required of him with hardly any trouble and no expence; and that, in point of fact, he was acquainted with the order to become guardian *ad litem* as soon as it was pronounced. It further appeared, that after the excommunication Sir WILLIAM SCOTT had behaved

haved with great generoſity to the plaintiff, amidſt the misfortunes which then overtook him; and that he had expreſſed the moſt unbounded gratitude for the kindneſs he experienced.

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Lord ELLENBOROUGH left it to the jury to decide upon the effect of the evidence, ſtating, that he himſelf did not perceive any thing unreaſonable in the plaintiff being required to become guardian *ad litem* in the manner deſcribed, and that the plaintiff ſeemed to have had ſufficient notice of the appointment according to the practice of the Eccleſiaſtical Court.

The jury found a verdict for the plaintiff with *forty ſhillings* damages; obſerving, at the ſame time, that they did not mean to throw the ſlighteſt reflection upon the highly reſpectable character of Sir WILLIAM SCOTT.

No motion was made for a new trial, or in arreſt of judgment.

Park, *Brougham*, and *Tindal*, for the plaintiff.

Garrow, S. G. and *Holroyd*, for the defendant.

[Attornies, *Flaſhman* and *Wilſon*.]

Vide *Boraine's Caſe*, 16 Veſey jun. 346. where upon an application to the Court of Chancery for a writ of *ne exeat*, to be directed to the BISHOP OF LONDON, requiring him to abſolve the plaintiff from this excommunication, Lord ELDON, C. obſerved, "At preſent I cannot ſee the principle, upon which, with regard to a ſon *forisfamiliated*, the father can be compelled to be guardian *ad litem*." His Lordſhip likewiſe ſaid, "that

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"that where the Spiritual Court has excommunicated a perſon for a cauſe for which they have not by the law of the land authority to do ſo, he has a right to ſome ſuch writ;"—but, excommunication being in the nature of proceſs to affiſt a demand againſt the party excommunicated, the writ was refuſed becauſe no notice of motion had been given to the complainant in the Spiritual Court.—Where the Judge of any Spiritual Court excommunicates a man for a cauſe of which he has not the legal cognizance, he is alſo liable to be indicted at the ſuit of the King. 2 Inſt. 623. 3 Bl. Com. 101.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Eaſter Term,

53 GEORGE III.

ADJOURNED SITTINGS AT WESTMINSTER.

1813.

Thurſday, June 3.

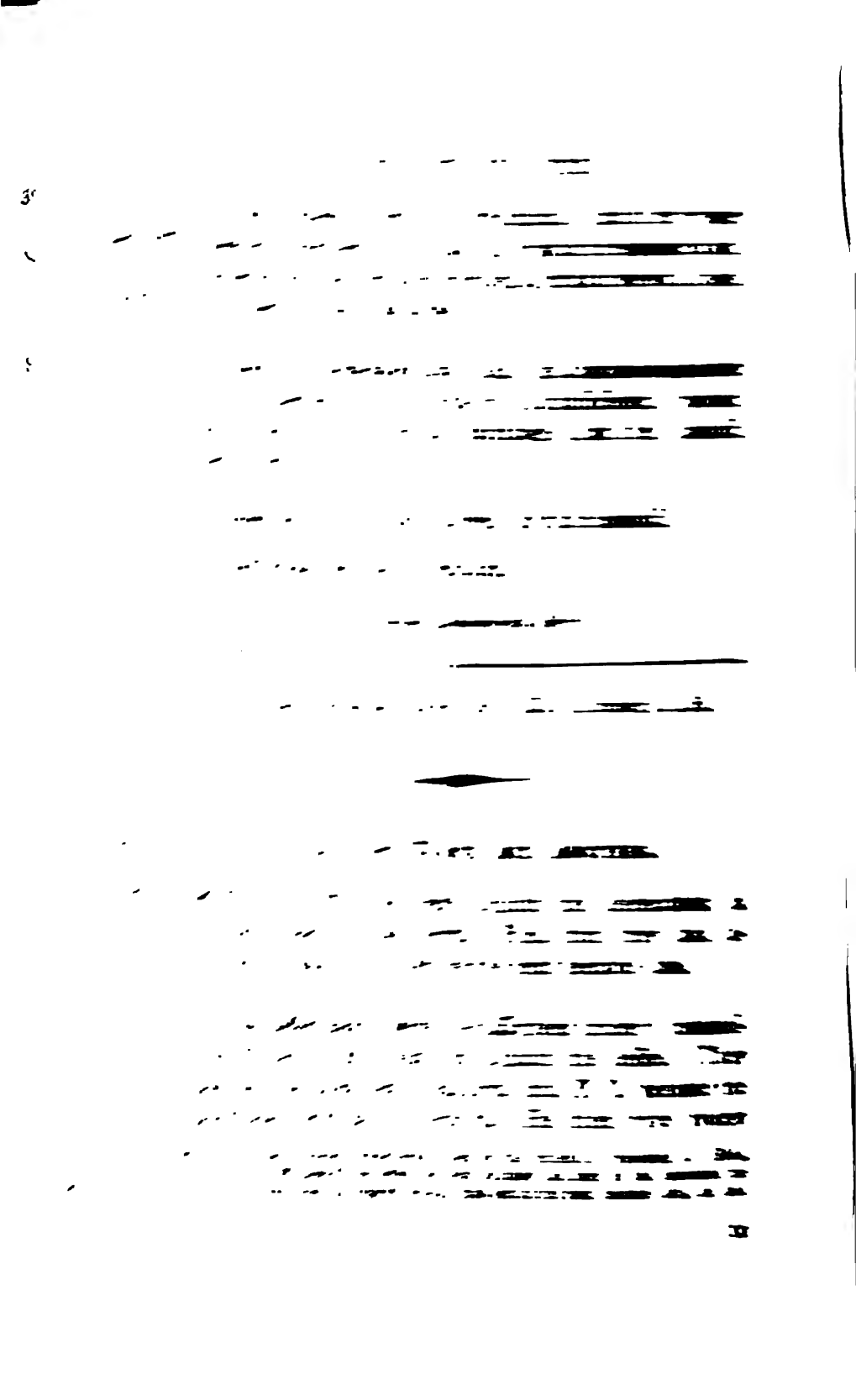
ANNE WILSON *v.* MITCHELL.

ASSUMPSIT for board and lodging. Plea, the General Iſſue.

To ſupport a defence to an action of aſſumpſit, that the plaintiff was under coverture when the cauſe of action accrued, although ſhe lived as a ſingle woman,—it is not enough to prove a bare declaration by her that ſhe had been married to J. S. who was ſtill alive, without actual proof of the marriage, or of cohabitation with her ſuppoſed huſband;—particularly if there appear any reaſon to doubt that the marriage was valid.

The defence ſet up was, coverture in the plaintiff when the debt accrued. She at that time lived by herſelf, and kept a boarding-houſe in Pall Mall. One of the plaintiff's witneſſes ſtated in croſs-examination, that ſhe had acknowledged ſhe was previouſly married to one *William Wilſon*, who is ſtill alive; but that, ſhe added, there was ſomething irregular in the marriage, ſo that it did not ſtand good.

Littledale, for the defendant, offered to prove acknowledgments both by her and *William Wilſon*, made



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ODELL v. WAKE and another.

to the ſolicitor to the aſſignees to prepare an aſſignment of the leaſe. It was prepared accordingly, and executed by the aſſignees and the bankrupt two years ago, before any rent became due; but it has remained ever ſince in the hands of the ſolicitor to the aſſignees, who has a lien upon it for the expence of preparing it.

Richardſon for the plaintiff contended, that as the aſſignment had not been delivered to, nor accepted by P. O., it did not operate to paſs the term to him; he was not liable for the rent, and the liability of the defendants therefore continued. In equity he might be compelled to accept of the aſſignment according to his contract, but it could not be forced upon him at law; and till he had actually accepted it, the mere execution of the deed did not alter the rights or liabilities of the parties.

Lord ELLENBOROUGH, however, held that under the circumſtances the aſſignment was complete before the rent became due; and the plaintiff ſubmitted to be nonſuited.

Richardſon and *Clarke* junior for the plaintiff.

Garrow, A. G. and *Marryat*, for the defendant.

[Attornies, *Rutledge* and *Wilkinſon*.]

Vide Chancellor v. Poole, Doug. 764. Taylor v. Shum, 1 Boſ. & Pul. 21.

Thurſday, June 3.

WYATT and another, Aſſignees of SHEPPARD a Bankrupt, *v.* BLADES and another, late Sheriff of Middleſex.

Where after a ſecret act of bankruptcy the ſheriff took in execution the goods of a trader under a fi. fa. and removed them to a broker's, and the aſſignees of the bankrupt afterwards ſerved a notice upon him not to ſell them; for which reaſon they were allowed to remain unſold at the broker's; held, that the ſheriff was liable to an action of trover at the ſuit of the aſſignees, without any demand of the goods.

TROVER for taking the bankrupt's goods in execution after a ſecret act of bankruptcy.

The act of bankruptcy was committed the 8th December laſt. The goods were ſeized on the 8th of February following, and carried to a broker's. On the 12th of the ſame month the commiſſion iſſued, and notice was afterwards ſerved upon the ſheriff not to ſell the goods, as they belonged to the aſſignees. In conſequence, the goods were never ſold, but ſtill remain at the broker's, and no demand of them was ever made.

Topping argued, that under theſe circumſtances there was no evidence of converſion. The goods remained in ſpecie, and were always ready to be delivered up to the aſſignees. They had been ſeized under legal proceſs; and the notice not to ſell was in itſelf a waver of the removal of the goods, amounting to an aſſertion that they had not been converted by the ſheriff, but ſtill exiſted as the property of the aſſignees.

Lord ELLENBOROUGH.—Had the goods not been removed, it would have been difficult to ſay there was any converſion; but I think the removal of them after the act of bankruptcy is a ſufficient converſion to maintain the action, notwithſtanding the ſubſequent notice.

The plaintiffs recovered.

Garrow,

Garrow, A. G. and *Barrow*, for the plaintiffs.

Topping and *Lawes* for the defendants.

[Attornies, *Jeffce* and *Smith*.]

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WYATT and another, v. BLADES and another.

Vide Countefs of Rutland's caſe, 1 Rol. Abr. 5. (L) pl. 1.

FAIRLIE *v.* BIRCH AND ANOTHER, Sheriff of Middleſex. Friday, June 4.

THIS was an action againſt the late ſheriff of Middleſex for the eſcape of one *Milbourne* on meſne proceſs.

In an action againſt the ſheriff for an eſcape upon meſne proceſs, it is enough, without producing the warrant, or giving direct evidence of the arreſt or eſcape, to prove the ſheriff's return of *cepi corpus*, and to ſhew that the party did not put in bail, and was not in the ſheriff's cuſtody at the return of the writ.

The plaintiff gave in evidence the ſheriff's return of *cepi corpus* to the writ, and proved that *Milbourne* did not put in bail above, and was not in the ſheriff's cuſtody at the return of the writ.

It was contended for the defendants, that the warrant ſhould be produced, and direct evidence ſhould be given of the arreſt and eſcape.—But,

Lord ELLENBOROUGH held, that both facts were ſufficiently proved, by the ſheriff's return and the non-appearance of the party according to the exigency of the writ.

The plaintiff had a verdict.

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STONEHOUSE and another, Assignees of DE CAPIET, a Bankrupt, v. DE SILVA.

ship; and it was under this commission that the plaintiffs were appointed assignees. *De Capiet* likewise carried on the separate trade of a manufacturer of artificial flowers; and the action was brought on a contract entered into with him on his separate account.

Park objected, that the plaintiffs had not properly described themselves in the declaration. That description could only be supported by a separate commission against *De Capiet*. They were, and ought to have been denominated, the assignees of *De Capiet* and *Caldas*.

Lord ELLENBOROUGH.—This action being on the separate contract of *De Capiet*, I do not think it was necessary to introduce the name of *Caldas*. The description the plaintiffs give of themselves, as far as it goes, is true, and is supported by the evidence. They are the assignees of *De Capiet*; and as to all separate transactions, the commission is separate. The defendant could not be led into any injurious mistake by this description; for as to his defence, it is immaterial whether the commission was separate or joint.

The plaintiff had a verdict.

Topping and *Abbott* for the plaintiff.

Park and *Barrow* for the defendant.

[Attornies, *Jones* and *Barrow*.]

Vide Hancock v. Haywood, 3 T. R. 433. Streatfield v. Halliday, 3 T. R. 779.

HODGKINSON

HODGKINSON *v.* WILLIS.

Thurſday, June 10.

On a trial at law, an examined copy of the plaintiff's anſwer to a bill in equity may be read in evidence againſt him, without producing the original.

THIS was an action againſt the maker of two promiſſory notes. The defence was, that they had been given in lieu of two bills of exchange which were tainted with uſury.

To prove that the notes had been ſubſtituted for the bills, the defendant propoſed to read in evidence an examined copy of the plaintiff's anſwer to a bill of diſcovery filed againſt him in the court of Chancery. A witneſs firſt produced an examined copy of the bill, and then an examined copy of the anſwer. The names of the parties in the equity ſuit appeared to be the ſame as thoſe of the parties to the preſent action; but there was no evidence of identity.

Garrow, A. G., maintained that the anſwer could not be read, unleſs the original were produced, and the ſignature proved to be the hand-writing of *Hodgkinſon*, the now plaintiff. This is always required upon indictments for perjury, and there is no difference, as to the rules of evidence, between civil and criminal proceedings.——It was impoſſible to ſay who the *Hodgkinſon* was againſt whom this bill was filed; and even if it was the plaintiff in the preſent action, a fictitious anſwer might have been filed in his name.

Lord ELLENBOROUGH.—I muſt have ſome evidence of the identity of the parties. But when it is eſtabliſhed

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bliſhed that the bill in equity was filed by the now defendant againſt the now plaintiff, I will preſume that the anſwer appearing on the file of the court of Chancery was put in by the latter, and I ſhall hold the examined copy ſufficient without the production of the original.

The plaintiff's attorney was then called, and ſtated, that the bill had been filed by the defendant againſt his client; whereupon the examined copy of the anſwer was read in evidence; but the uſury could not be ſubſtantiated, and the plaintiff recovered.

Garrow, A. G., and *Beſt* for the plaintiff.

Park for the defendant.

[Attornies, *Stokes & Cuppage.*]

But an affidavit made by the vendor of an eſtate before a Maſter in Chancery, to ſatisfy the purchaſer that the eſtate was free from incumbrances, being extrajudicial, cannot be proved without producing the original. Smith v. Goodier, 3 Mod. 36. Gilb. Law Ev. 57.

MATTHEWS *v.* WEST LONDON WATER WORKS COMPANY.

Thurſday, June 10.

THIS was an action againſt the Weſt London Water Works Company (which is incorporated by act of parliament), for negligence in making an excavation and throwing up rubbiſh in a public ſtreet, without properly guarding the ſame; whereby a ſtage coach, which the plaintiff was driving, was overturned, and he was ſeverely hurt.

An action on the caſe may be maintained againſt an incorporated Water-works Company, where workmen employed by perſons who contract with the Company to lay down pipes for conducting water through a public ſtreet do the work in a negligent manner, whereby an individual paſſing along the ſtreet receives an injury.

It appeared that the Weſt London Water Works Company contract with certain pipe-layers to lay down iron pipes for the conveyance of water through the different ſtreets of the metropolis, and that the pipe-layers hire the men actually employed to do the work. Theſe men, in laying pipes in Tottenham-Court-Road, left a quantity of rubbiſh in the ſtreet, without any light ſufficiently to ſhew it, or watchman to warn paſſengers of their danger. The conſequence was, that the Liverpool coach, driven by the plaintiff, was overturned, his leg was broken, and he was rendered a cripple for life. The queſtion being made, whether, under theſe circumſtances, the action ought not to have been brought againſt the pipe-layers?——

Lord ELLENBOROUGH ſaid, he had no doubt the Water Works Company was liable, and the plaintiff recovered a verdict for £525. damages.

Garrow,

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MATTHEWS v. WEST LONDON WATERWORKS COMPANY.

Garrow, A. G., and *Curwood* for the plaintiff.

Dampier and *Selwyn* for the defendants.

[Attornies, *Henrick & Sloper.*]

Vide Buſh v. Steinman, 1 B. & P. 405. Flower v. Adam, 3 Taunt. 314.

Saturday, June 12.

BUDD v. MARY FOULKS.

A perſon put in to ſuperintend an unlicenſed houſe for the reception of lunatics is liable to the penalties of 14 Geo. 3. c. 49. without having any ſhare in the profits of the eſtabliſhment.

THIS was an action of debt in the name of the treaſurer of the College of Phyſicians, on 14 Geo. 3. c. 49. ſ. 1., to recover a penalty of £500. for concealing, harbouring, entertaining, and confining in a houſe kept for the reception of lunatics, more than one lunatic at one time, without having a licence for that purpoſe.

It was proved that in an unlicenſed houſe of which the defendant acted as the miſtreſs, ſeveral female lunatics were kept, within ſix months before the ſuing forth of the writ.

Marryat, for the defendant, propoſed to prove that ſhe was merely a ſervant; that the houſe in point of fact belonged to a Mr. *Dunſton*, and that it was kept by her on his account.

Lord ELLENBOROUGH.—It is immaterial whether the defendant has any intereſt in the houſe or not. If

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BUDD v. MARY FOULKS.

If a person be put in to manage such a house for another, that person is liable. Here the defendant *harboured*, *entertained*, and *confined* the unhappy females that were under her care in this house kept for the reception of lunatics. A different construction of the statute would permit its wholesome provisions to be evaded without difficulty.

Some doubt arose as to the necessary evidence, that the plaintiff was treasurer to the College, in whose name the action must be brought. No witness was called who was present at his election; but the annals of the *Comitia Majora*, in the hand-writing of *Dr. Harvey*, the registrar, and signed by *Sir Francis Milman*, the president, were produced, recording his appointment; and it was proved that he had afterwards acted as treasurer. Lord Ellenborough held this to be sufficient.

In an action on 14 Geo. 3. c. 49. by the Treasurer of the College of Physicians,—to prove his right to sue in that capacity, it is enough to put in the annals of the *Comitia Majora* recording his appointment, and to shew that he afterwards acted as treasurer, without calling any one who was present at the election.

The plaintiff had a verdict.

Garrow, A. G., *Park*, and *Dampier*, for the plaintiff.

Marryat for the defendant.

[Attornies, *Roberts* and *Selby*.]

Vide Rex v. Campbell, 1 Campb. 91.

Monday, June 14.

M'CULLOCH *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

Where there is an insurance on ship and freight, and the ship has arrived in safety and earned freight, the assured cannot afterwards claim a return of premium on the ground that he had no insurable interest, on account of a defect in his title to the ship.

THIS was an action of debt for money had and received, to recover the sum of £1,260. as a return of premium upon a policy of insurance executed by the defendants.

The case came on upon admissions, which stated,—

"That on the 21st of August 1812 a policy of insurance was effected by Messrs. Amyand, Cornwall, and Co. with the defendants, by the order and on account of the plaintiff, for the sum of seven thousand pounds, upon the ship *Duke of Kent* and her freight, being £4,000. upon the ship, and £3,000. on freight, on a voyage from *Saint Domingo* to the port of *London*, at a premium of £21. per cent.

"That a return of premium for the ship's sailing armed with 12 guns, and arrival as stipulated by the policy, has been made by the defendants, leaving the sum of £1,260. as the net premium paid to them for effecting the said policy.

"That in the month of May 1809 the said ship proceeded upon a voyage to the West Indies from the port of London, and that Mr. *Richard Gardiner* was then the sole owner thereof in the register of the port of London, and that he is now the sole registered owner in the said register in the said port, and that he has never transferred his property in the said ship to any person, nor has the same ever been transferred by his consent or authority.

"That

"That the ſaid ſhip arrived at Martinique, where ſhe took in a cargo on freight for Europe, and ſailed from thence on the 1ſt Auguſt 1809.

"That having met with damage on the ſaid laſt-mentioned voyage, the ſaid ſhip put into the harbour of St. John's, Antigua, in diſtreſs, and, after being ſurveyed by a warrant from the Vice-Admiralty Court of that Iſland, ſhe was condemned to be ſold as being unfit to be repaired, and was accordingly ſold by virtue of an order of the ſaid Vice-Admiralty Court to Matthew King.

"That Matthew King afterwards obtained from the proper officer of the cuſtoms of the ſaid iſland a new colonial regiſter for the ſhip, and remained in poſſeſſion of her till September 1811, during which time he cauſed her to be repaired at a great expence, conceiving that he had obtained by virtue of the ſale herein-before mentioned, a full and complete title to the ſaid ſhip.

"That in September 1811 the ſaid Matthew King ſold the ſaid ſhip to the plaintiff at Guadaloupe for the ſum of 14,500 dollars, and executed a regular bill of ſale of her to him, at which time and till ſome days after the arrival of the ſhip in England (as herein-after mentioned), the plaintiff had no notice or knowledge of any adverſe claim or title to the ſaid ſhip, but on the other hand was fully convinced that he had acquired a good and ſufficient title thereto.

"That the plaintiff, after the purchaſe of the ſaid ſhip, and while he retained the poſſeſſion thereof, ex-

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pended the ſum of £3,346, in various diſburſements for the uſe of the ſaid ſhip, and for the outfit of the voyage in queſtion.

"That the plaintiff employed the ſaid ſhip in a coaſting voyage to the Spaniſh Main, and in June 1812 he procured a freight for her at St. Domingo for London, being the voyage inſured by the policy in queſtion, where ſhe arrived on or about the 20th September laſt, and ſafely delivered her cargo; and the freight of the ſaid cargo, amounting to about the ſum of £2,867. 10s. 11d. has been duly paid to the plaintiff.

"That after the arrival of the ſaid ſhip, and the delivery of her cargo, the ſaid Richard Gardiner obtained poſſeſſion of the ſaid ſhip under an Admiralty warrant, and now ſeeks to recover the amount of the freight ſo paid to the plaintiff."

Scarlett, for the plaintiff, contended, upon theſe facts, that he had no inſurable intereſt in the ſhip or freight, and that therefore the premium might be recovered back. Reid *v.* Darby, 10 Eaſt. 142. is an expreſs authority to ſhew, that no property or intereſt in the ſhip was transferred by the ſale under the ſentence of the Vice-Admiralty Court at Antigua. The excluſive ownerſhip therefore all along remained in *Gardiner*, in whoſe name ſhe ſtood regiſtered. The plaintiff was tortiouſly in poſſeſſion of her, and would have been liable to an action of trover for refuſing to deliver her up. It has often been decided, that courts of juſtice can look to no title to ſhipping except what

is evidenced by the regiſter acts; and the plaintiff having no title to the ſhip, if a loſs had happened, he could not have ſucceeded in an action on the policy. The production of the regiſter in the name of *Gardiner* muſt have completely defeated his claim.—That part of the inſurance which is on freight comes exactly under the ſame conſideration. In Camden *v.* Anderſon, 5 T. R. 709. it was determined, that no one can have an inſurable intereſt in freight except the regiſtered owner of the ſhip. The Court there ſaid, "the "right to freight reſults from the right of ownerſhip; "and if the plaintiffs have no title to the ſhip, they "have no intereſt in the freight. And if the plaintiffs "have neither a legal nor equitable intereſt in the "ſhip, they have no intereſt which is the ſubject of "an inſurance." Thus the Defendants have incurred no liability, and have received the premium without running any hazard. The premium was paid to them without any conſideration, and they cannot be allowed to retain it. This is not a wagering policy. There is no illegality on the part of the plaintiff. He believed the ſhip to be his own when he effected the inſurance. Therefore, it is like the common caſe of ſhort intereſt. In *Routh* v. *Thompſon*, 11 *Eaſt*. 428. where the captors of a Daniſh ſhip were found not to have an inſurable intereſt in her, it was clearly held that they were entitled to recover back the premium; and it ſeems impoſſible to diſtinguiſh that caſe from the preſent.

Lord Ellenborough. In *Routh* v. *Thompſon*, a loſs had happened and an action was brought againſt the underwriters to recover the ſum inſured. They reſiſted the demand on the ground that there was no

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insurable interest. As they denied their liability on the policy, they were not under these circumstances allowed to retain the premium. But here the voyage has been performed, and the ship has arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter, and to say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favour of the underwriters, it does not lie in your mouth to tell them they never were liable, and that the premium was a payment without consideration. I am perfectly clear the plaintiff has no right to recover. It would place underwriters in a very aukward situation, if after the safe arrival of the ship, the assured could come to them and say, "We had no legal title to her; on account of some secret transactions which you had no means of investigating, we had no insurable interest; and you must pay us back the premium which you imagined you had earned."

Plaintiff nonsuited.

Scarlett, *Campbell* and *Spankie* for the plaintiff.

Garrow, A. G. *Park* and *Bosanquet* for the defendants.

[Attornies, *Blunt* and *Kaye*.]

Vide Lowry v. Bourdieu, Doug. 467. Vandyck. Hewitt, 8 East, 97.

ADJOURNED SITTINGS AT GUILDHALL.

CLARKE and Another, *v.* NOEL.

Wednesday, June 16.

The purchaſer of goods to be paid for by bill upon his agent, is not diſcharged by the ſeller taking a renewal of the bill without giving him notice, if the agent had not funds in hand to pay the bill when it became due.

ACTION for goods ſold.

The plaintiffs were manufacturers at *Birmingham*, and ſent out the goods in queſtion by the defendant's orders to *Rio Janeiro*, where he reſided. By an agreement between the parties, the plaintiffs were to be paid the value of the goods by bill upon one *Aaron*, an agent of the defendant in London. The plaintiffs accordingly drew a bill for the amount upon *Aaron*, which he accepted. When it became due, he had produce in his hands conſigned to him by the defendant more than ſufficient to ſatisfy it; but there was no market for this at that time. He ſtated to the plaintiffs that he was unable to pay the bill; and they twice allowed him to renew it, without informing the defendant. *Aaron* afterwards failed, with money of the defendant's in his hands more than ſufficient to anſwer the acceptance.

Garrow, A. G. contended that under theſe circumſtances the defendant was diſcharged, as the plaintiffs had given a new credit to *Aaron*, and made him their debtor. But,

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Lord ELLENBOROUGH was of opinion, that *Aaron* was only in the nature of a ſurety; and remarked, that as he was not in caſh to pay the bill when it became due, it was rather in favour of the defendant to allow it to be renewed. The debt was originally due from the defendant; and the ſecurity taken from his agent could be no extinction of it. It was impoſſible to ſay that the purchaſer of goods could be diſcharged under theſe circumſtances by want of notice, like the drawer of a bill of exchange.

The plaintiffs had a verdict, which in the enſuing term, upon a motion for a new trial, was approved of by the court.

Park and *Copley* for the plaintiffs.

Garow, A. G. and *Scarlett* for the defendant.

[Attornies, *Bourdillion* and *Searle*.]

Vide Owenſon v. Morſe, 7 T. R. 64. Tapley v. Martens, 8 T. R. 451.

Wedneſday, June 16.

EICKE v. MEYER.

Where colonial produce is ſold, through the intervention of a broker; by the uſage of trade in London, (which was held to be valid,) he is entitled in all inſtances (if there be no expreſs ſtipulation to the contrary) to ½ per cent. commiſſion from the purchaſer, as well as from the ſeller.

ACTION for work and labour as a broker, and for commiſſion.

The

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The plaintiff is a ſworn broker of the city of London. In November and December laſt he bought ſeveral parcels of coffee from different perſons for the defendant, and ſent him in a *bought note* for each. In ſome of theſe a charge was made of "$\frac{1}{4}$ per cent. brokerage," in others brokerage was not mentioned. Upon ſome of theſe purchaſes the plaintiff had received $\frac{1}{4}$ per cent. brokerage from the ſellers; in others, by expreſs ſtipulation, he was to receive from the ſellers no brokerage at all. As to ſome of the parcels of coffee, he was firſt employed by the ſellers to diſpoſe of them; as to others, he went in the firſt inſtance to the ſellers, and offered to purchaſe them on behalf of the defendant. Upon the whole he claimed from the defendant a commiſſion of $\frac{1}{4}$ per cent. In ſupport of the demand a great number of brokers and merchants ſwore, that unleſs there be ſome expreſs agreement to the contrary, it is the uſage of trade in London, for the perſon who purchaſes colonial produce through the intervention of a broker, to pay him $\frac{1}{4}$ per cent. commiſſion, whether he employs the broker originally to look out for the commodity, or the broker, having been originally employed by the ſeller, offers him the commodity to purchaſe; and whatever bargain as to brokerage there may be between the broker and the ſeller; and whether the brokerage be or be not mentioned in the ſale note, if that expreſſes that the goods are bought by order and on account of the purchaſer.

Garrow, A. G. for the defendant contended, that by law there can be no claim to brokerage from the purchaſer, except where the broker is employed by him in the firſt inſtance to purchaſe the goods; that

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where he is employed by the ſeller to diſpoſe of them, his demand is only on the ſeller, whoſe agent he is, and that being paid $\frac{1}{2}$ per cent. commiſſion by the ſeller, he can have no right to any further remuneration for his ſervices.—But,

Lord ELLENBOROUGH held the uſage as proved to be good, and the plaintiff recovered the full amount of his demand.

Scarlett and *Campbell* for the plaintiff.

Garrow, A. G. and *Puller*, for the defendant.

[Attornies, *Eicke* and *Kearſey*.]

Thurſday, June 17.

BUCKMAN *v.* LEVI.

A delivery of goods at a wharf is not ſufficient to charge the purchaſer, unleſs the ſeller procures them to be booked, or takes a receipt for them, or delivers them in ſuch a manner as to furniſh a remedy over againſt the wharfinger.

THIS was an action for goods ſold and delivered, to recover the value of two dozen of chairs.

The plaintiff is a chair manufacturer in London, who had been in the habit from time to time of ſupplying chairs to the defendant, an upholſterer at *Wells*, in Norfolk. Theſe chairs had been carried by the plaintiff to *Harriſon's Wharf*, *Irongate*, from whence they were forwarded by water to the defendant. Sometimes they were booked at the wharf, and ſometimes they were not; but till the parcel in queſtion, which never reached him, they had always arrived ſafe,

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safe. A servant of the plaintiff was the only witness to speak to the delivery of these two dozen. He stated, that he took them to *Harrison's Wharf*, and left them on the premises there, with a direction to the defendant, piled up among other goods; he had no receipt for them, nor was any entry respecting them made in the wharfinger's books; he saw a man upon the wharf whom he believed to be a servant of the wharfinger, but he did not know his name, and should not be able to recognize his person; he had no conversation with the wharfinger or any other person upon the premises.

It was objected, for the defendant, that here was no sufficient evidence of a delivery to charge him, as the goods had not been booked in his name at the wharf, and he would have no remedy over against the wharfinger.

On the other side, they contended, that no receipt or booking was necessary. According to *Dutton* v. *Solomonson*, 3 Bos. & Pul. 582, and other cases, a delivery of goods to a carrier or wharfinger is a delivery to the purchaser. The delivery of these goods on the wharf, in the presence of a person who appeared there as servant to the wharfinger, was sufficient. Goods so delivered before, had safely reached their destination; and this must be considered the established mode of dealing between the parties.

Lord ELLENBOROUGH. A delivery of goods to a carrier or wharfinger with due care and diligence, is sufficient to charge the purchaser; but he has a right

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to require, that in making this delivery due care and diligence ſhall be exerciſed by the ſeller. Before the defendant can be charged in the preſent inſtance, he muſt be put into a ſituation to reſort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked; and no perſon belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himſelf, or ſome perſon who can be proved to be his agent for the purpoſe of receiving them. The perſon upon the wharf when the chairs were left, might be a thief, watching for an opportunity to purloin them; the defendant therefore is not furniſhed with a remedy over againſt the wharfinger, and is not himſelf liable as purchaſer of the goods.

Verdict for the defendant.

Park and *Comyn* for the plaintiff.

Garrow, A. G., for the defendant.

[Attornies, *Pope* and *Ruſſell*.]

Vide Clarke v. Hutchins, 14 Eaſt, 475. Cothay v. Tute, *ante*, 129. Strong v. Laing, *poſt*.

BENJAMIN *v.* BANK OF ENGLAND.

Thurſday, June 17.

TROVER for a Bank of England note for £40.

A. paid a Bank of England note to B., who paid it to C., who preſented it at the Bank, where it was ſtopped, on the ground that it had been fraudulently obtained from a former holder.—*Held* that altho' A. thereupon paid the amount of the note to C., in diſcharge of the debt due to him from B., A. could not maintain trover for the note againſt the Bank of England.

The plaintiff, being the holder of this note, paid it in diſcharge of a debt to one *Jacobs*. *Jacobs* paſſed it to one *Phillips*, who preſented it for payment at the Bank. There it was ſtopped, on the ground that it was one of ſeveral notes obtained by means of a forged cheque from *Glynn and Co.*, the bankers. *Phillips* thereupon threatened to arreſt *Jacobs* for the £40., and this ſum was paid to *Phillips* by *Benjamin*, the plaintiff.

Lord ELLENBOROUGH ruled, that under theſe circumſtances the action ought to have been brought in the name of *Phillips*, and could not be maintained by *Benjamin*, who had parted with his property in the note, and had no intereſt in it at the time it was ſtopped by the Bank.

Plaintiff nonſuited.

Park and *Andrews* for the plaintiff.

Garrow, A. G., for the defendant.

[Attornies, *Iſaacs* and *Kaye*.]

Vide Goggerley *v.* Cuthbert, 2 N. R. 170.

MORSE

Thurſday, June 17.

MORSE and others, Aſſignees of T. A. KERRISON, a Bankrupt, *v.* WILLIAMS and others.

Where a ſum of money has been lodged with a party to indemnify him againſt bills of exchange he has accepted for the accommodation of another, an action will not lie againſt him to recover the money whilſt the bills are outſtanding, altho' the ſtatute of limitations has run upon them.

MONEY had and received to recover the ſum of £886. 10*s.* under the following circumſtances:

Sir Roger Kerriſon deceaſed, and *T. A. Kerriſon*, the bankrupt, were in partnerſhip as bankers at *Norwich*. Between the years 1784 and 1806, the defendants, who are bankers in London, accepted for them certain bills of exchange, to the amount of £886. 10*s.* which have never yet been taken up or preſented for payment. *Sir Roger Kerriſon* died the 16th June 1808, and a commiſſion of bankrupt was ſued out againſt *T. A. Kerriſon* on the 30th of June in the ſame year. The defendants then having a conſiderable balance belonging to him in their hands, paid over the whole of it to the plaintiffs, except the ſum now in diſpute, which they claim to retain for the purpoſe of anſwering the outſtanding bills they had accepted.

Garrow, A. G., contended, that they had no longer a right to do ſo, as it muſt be preſumed that the bills were ſatisfied; and, at any rate, as more than ſix years had elapſed ſince they reſpectively became due, the defendants were ſufficiently protected by the ſtatute of limitations.

Lord ELLENBOROUGH.—I ſee no ground on which I can preſume that bills are ſatisfied which are allowed to be outſtanding; and I do not think the defendants are

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are to be driven to plead the statute of limitations to actions on their own acceptances, which they know they have never paid. They have a right to retain the money till the bills are properly accounted for, or some satisfactory arrangement is made for their indemnity.

Plaintiffs nonsuited.

Garrow, A. G. and *Gurney*, for the plaintiffs.

Park and *Tindal* for the defendants.

[Attornies, *Windus* and *Shawe*.]

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term,

53 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

1813. Thurſday, July 8.

HOBBS, GENT. ONE, &c. *v.* BRANSCOMB, DRINKWATER, AND OTHERS.

A peace officer may juſtify taking a perſon into cuſtody charged with a felony, although no felony was committed. The ſame rule ſtated to have been laid down by BULLER, J. with reſpect to a breach of the peace.

THIS was an action for falſe impriſonment, to which *Branſcomb* and *Drinkwater* pleaded the general iſſue, and the other defendants ſuffered judgment by default.

The plaintiff, who is an attorney, was employed by *Mrs. Rye* to recover a legacy for her of £170. After ſome litigation, a meeting took place for the purpoſe of paying it. The executors from whom it was due then told out the money in Bank of England notes. *Mrs. Rye*, not being able to read, gave the notes to the plaintiff, that he might ſee they were right. He counted them over; but inſtead of returning them to her, put them in his pocket, ſaying he had a demand upon her for his bill, (which amounted to about £20.) and that he would ſettle with her by and by. Under the advice of the other defendants, who had ſuffered judgment

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judgment by default, ſhe immediately called in *Branſcomb* and *Drinkwater*, who were conſtables, accuſed him of having ſtolen her money, and gave him in charge for the felony, deſiring that they would carry him before the Lord Mayor. They accordingly took him to the Manſion Houſe, where the notes were reſtored to *Mrs. Rye*.

Park, for the plaintiff, inſiſted, that the officers could not juſtify the impriſonment, as no felony had been committed.

Garrow, A. G. contrà, cited *Samuel v. Payne*, Doug. 358. and the MS. note of a caſe of *Williams v. Dawſon*, ruled at Niſi Prius in 1788 by Mr. Juſtice Buller, in which that learned Judge laid down, that "if a peace officer of his own head takes a perſon into cuſtody on ſuſpicion, he muſt prove that there was ſuch a crime committed; but that if he receives a perſon into cuſtody, on a charge preferred by another of felony or breach of the peace, there he is to be conſidered as a mere conduit, and if no felony or breach of the peace was committed, the perſon who preferred the charge alone is anſwerable."

Lord ELLENBOROUGH ſaid, this rule appeared to be reaſonable, and that very injurious conſequences might follow to the public, if peace officers, who ought to receive into cuſtody a perſon charged with a felony, were perſonally anſwerable, ſhould it turn out that in point of law no felony had been committed. His Lordſhip therefore directed a verdict for the defendants

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fendants *Branscomb* and *Drinkwater*; and the jury assessed the damages against the others at 1s.

Park and *E. Lawes* for the plaintiff.

Garrow, A. G. and *Marryatt*, for the defendant.

[Attornies *Hobbs* and *Newman*.]

But if B. be arrested by mistake under a warrant against A. the keeper of a prison, to whom he is delivered, and who detains him in custody under the warrant, believing him to be A., is liable to an action of false imprisonment at B.'s suit. Aaron v. Alexander, ante, 35.

ADJOURNED SITTINGS AT WESTMINSTER.

Thursday July 15.

Watchorn v. Langford, and others.

If a person who is not a linen draper, insures his "stock in trade, household furniture, *linen*, wearing apparel and plate," by a policy against fire, this will not protect linen drapery goods subsequently purchased on speculation; and the word *linen* in the policy must be confined to household linen or linen used by way of apparel.

THIS was an action on a policy of insurance, executed by the defendants as Directors of the Eagle Insurance office; whereby the plaintiff, a coach-plater and cow-keeper in Newton Street, Holborn, insured for one year, from 29th September 1811 to 29th September 1812, his "stock in trade, household furniture, *linen*, wearing apparel, and plate."

A fire happened in the plaintiff's premises on the 13th of August 1812, and consumed (amongst other

things)

things) a large ſtock of linen-drapery goods, which a ſhort time before he had purchaſed on ſpeculation.

One item of the plaintiff's demand was for the value of theſe goods, which, it was contended, were protected by the policy under the denomination of "linen."

Lord ELLENBOROUGH.—I am clearly of opinion that the word "*Linen*" in the policy does not include articles of this deſcription. Here we may apply "noſcitur à ſociis." The preceding words are "*houſehold furniture*," and the ſucceeding, "*wearing apparel*." The "*linen*" muſt be "*houſehold linen or apparel*."

The cauſe was afterwards referred.

Jervis, *Scarlett*, and *D. Pollock*, for the plaintiff.

Garrow, A. G., and *Park*, for the defendants.

[Attornies, *Wood* and *Beetham*.]

Thurſday, July 15.

ELLIS *v.* SHIRLEY.

In an action by a bankrupt againſt his aſſignee to try the validity of the commiſſion, if there be no notice under Sir S. Romilly's act, the proceedings are only primâ facie evidence for the defendant, and the plaintiff may call witneſſes to contradict the depoſitions reſpecting the trading, petitioning creditor's debt, or act of bankruptcy.

THIS was an action of treſpaſs to try the validity of a commiſſion of bankrupt which iſſued againſt the plaintiff on the petition of the defendant, and under which the defendant was choſen aſſignee. Plea, the general iſſue.

No notice was given by the plaintiff under Sir S. Romilly's act, that he meant to diſpute the validity of the commiſſion.

It was proved that the defendant as aſſignee, ordered the plaintiff's goods to be ſeized by the meſſenger, who took poſſeſſion of them accordingly.

On the part of the defendant they put in the commiſſion and the proceedings under it, as in *Simmonds* v. *Knight*, ante 251.

The plaintiff's counſel then propoſed to give evidence to diſprove the petitioning creditor's debt ſtated in the depoſition on which the plaintiff was declared bankrupt.

On the other ſide it was contended, that by the late act of parliament, 49 G. 3. c. 121. ſ. 10. where no notice is given, the proceedings under the commiſſion, if ſufficient upon the face of them, are concluſive evidence of the trading, petitioning creditor's debt, and act of bankruptcy. The object of the act was to prevent the neceſſity of the aſſignees bringing evidence in ſupport of the commiſſion, unleſs they

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they had previous notice that it was disputed; and that object would be entirely frustrated if in every case the proceedings might be falsified. The assignees, to avoid being taken by surprize, must then always come prepared with witnesses to support the commission, in the same manner as before the act passed.

Lord ELLENBOROUGH.—Where no notice is given, the act makes the proceedings "evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy." But I cannot give more effect to the depositions before the commissioners than to the *viva voce* testimony of witnesses adduced at the trial. The proceedings are *primâ facie* evidence, but not conclusive. Where an action is brought against assignees by the bankrupt, who disputes the validity of the commission, it is not very likely they should be taken by surprize. At any rate, I am of opinion it is competent to the plaintiff to disprove the petitioning creditor's debt.

The evidence was accordingly received, and the jury found a verdict for the plaintiff, with £20. damages.

A new trial was afterwards granted on payment of costs.

Jervis and *Marryat* for the plaintiff.

Topping and *Scarlett* for the defendant.

[Attornies, *Giles* and *Birkett*.]

Thurſday, July 15.

GREAVES v. ASHLIN.

If a written contract for the ſale of goods ſpecifies no time for delivering them, in an action for not delivering them, it is not competent for the defendant to give parol evidence that it was a condition of ſale that the goods ſhould be taken away immediately, or that by the uſage of trade where goods are ſold to be delivered at a diſtant day, the time is always mentioned in the written contract.

Although the purchaſer of goods neglects, after notice, to carry them away, the ſeller has no right on that account to re-ſell them.

THIS was an action for not delivering 50 quarters of oats ſold to the plaintiff on the 16th March 1810, by the following contract, ſigned by the defendant's agent:

"Sold to John Greaves 50 quarters of oats at "45s. 6d. per quarter, out of 175 quarters.

"J. Stevenſon for J. Aſhlin."

The plaintiff at the ſame time received a delivery order. The defendant, on the 23d March, complained to the plaintiff that the oats were not carried away, and gave notice, that if they were not carried away immediately, he ſhould re-ſell them to other perſons. The plaintiff ſtill neglecting to carry them away, the defendant re-ſold them accordingly, at 51s. per quarter.

The defendant's counſel at firſt attempted to prove, that his agent had verbally made it a condition of the ſale, that the plaintiff ſhould take away the oats immediately, and had abated 6d. per quarter of the price originally offered, in expectation of his agreeing to do ſo. But —

Lord ELLENBOROUGH was of opinion, that it was not competent to the defendant to give ſuch evidence, as it materially varied the contract, which had been reduced into writing; and he cited *Meres* v. *Anſell*, 3 Wilſ. 275. His Lordſhip was likewiſe of opinion, that a witneſs could not be aſked, whether, according to the uſage of the corn-market, if corn be ſold to be delivered

delivered at a distant day, the time should not be inserted in the contract; as that was only an indirect method of giving parol evidence to vary the written contract.

The defendant's counsel then insisted, that he was entitled to re-sell the oats in the manner he had done, the plaintiff not having carried them away in a reasonable time after notice. Under these circumstances, the contract might be considered as dissolved, and the property in the goods re-vested in the defendant.

Lord ELLENBOROUGH.—If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. When a farmer sets out his tithes, and gives the parson notice to take them away, he may bring his action, if the latter does not do so within a reasonable time; but the parson's neglect does not revest in the farmer the property in the articles set out. In this case the notice given to fetch away the goods could not discharge the defendant from his contract, nor empower him to sell the property of the plaintiff.

The plaintiff had a verdict for the difference between the price at which he bought the oats and the sum for which they were resold.

Park and *Nolan* for the plaintiff.

Garrow, A. G. and *Comyn* for the defendant.

Vide Langfort v. Administratrix of Tyler, Salk. 112.

ADJOURNED SITTINGS AT GUILDHALL.

Wednesday, July 28.

THOMPSON *v.* INGLIS and others.

Where the charterer of a ship for a voyage to Tobago and back, covenanted to load and dispatch her in time to join the convoy that should be appointed to sail from the West Indies on the 1st of August, held that he was liable for not having loaded and dispatched her by the 22d of July, the day the West India convoy passed the Island of Tobago, although he offered to load her with a complete cargo if she would stop a few days longer.

THIS was an action of covenant on a charter-party, for a voyage from *London* to *Tobago* and back; whereby the defendants covenanted to load or cause to be loaded on board the ship at *Tobago*, a full and complete cargo of produce, and to dispatch her therewith for *London*, in time to join the convoy that should be appointed to sail from the *West Indies* for *Great Britain* on the 1st of *August*.

The ship arrived at *Tobago* on the 8th of *July*, and was ready to take in the homeward cargo on the 14th. There was time to have loaded her before the 22d, when the convoy sailed from Tobago. On that day, only a small quantity of goods had been supplied, but an offer was made to the captain of a complete cargo if he would stop a few days longer. He refused to do so, and sailed away for England.

Topping, for the defendants, contended that the ship was bound to wait at Tobago till the 1st of August. If she had done so, she would have been completely loaded and dispatched on that day. Thus there had been no breach of covenant on the part of the freighters, who were prevented from loading a full cargo by the default of the captain.

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Lord ELLENBOROUGH. I think the captain was at liberty to ſail from Tobago on the 22d, the day when the convoy paſſed that iſland. The covenant muſt receive a reaſonable conſtruction. Had the ſhip not arrived in time to be loaded by the 22d, the caſe would have been different; but as ſhe was ready to take in goods for the homeward voyage on the 14th of July, the charterers were bound to have ſupplied her with a full cargo before the time when the general Weſt India convoy paſſed by the ſtation where ſhe lay. Even if the captain might have been able afterwards to have overtaken it, he was not bound to wait for the convenience of parties, as he muſt thereby have encreaſed the riſk of capture.

Verdict for the amount of dead freight claimed.

Park and *Carr* for the plaintiff.

Topping and *J. Warren* for the Defendants.

[Attornies, *Falcon*, and *Gregg & Corfield*.]

HARMAN v. VAUX.

Wedneſday, July 28.

THIS was an action to recover an average loſs upon a cargo of barley inſured by the defendant at and from *Limerick* to *Oporto*, *Liſbon* and *Figueras*. The policy contained the uſual memorandum, warranting corn free from average, unleſs general, or *the ſhip be ſtranded*.

Where there is a warranty in a policy of inſurance againſt average, "unleſs general, or the ſhip be ſtranded," if during the voyage the ſhip is forced aſhore by the wind, or is driven on a bank, and remains faſt for any time, this is a ſufficient ſtranding to do away the effect of the warranty, although the ſhip is not proved to have thereby received any material damage.

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As the ſhip was proceeding down the river from *Limerick*, and was off *Scatery Iſland*, the wind, which was moderate, ſuddenly took her a-head, and ſhe went a-ſhore, ſtern foremoſt. There ſhe remained faſt for two hours, till the tide flowed, when ſhe got off and proceeded on her voyage. A witneſs ſtated that ſhe muſt have ſtrained a good deal while lying on the ground; but when ſhe again floated it was not perceived that ſhe had ſuſtained any injury. On her arrival at *Oporto* the barley was found conſiderably damaged. She experienced ſtormy weather on her paſſage thither. The only queſtion was, whether the ſhip had been *ſtranded* within the meaning of the memorandum.

Scarlett for the defendant, contended that it muſt be a ſtranding, from which a reaſonable preſumption ariſes that the cargo has been damaged. If there was evidence that any damage had been produced by the ſhip being a-ground, then it fulfilled the condition, and rendered the underwriters liable for any average loſs that occurred from that or any other cauſe. But for this purpoſe it was not enough that a ſhip ſhould be left dry for an hour or two on a mud bank, in a river,—a circumſtance perpetually happening, without being conſidered a miſchance. He mentioned a caſe lately decided in the Exchequer, in which he had been counſel, where a much ſtricter conſtruction was put upon the word *ſtranding*. A ſtatute provides, that goods where the ſhip is *ſtranded* or wrecked, ſhall not be liable to duties. A ſhip was caſt a-ſhore at the mouth of the river *Merſey*, and the cargo unloaded. But becauſe the hull of the ſhip

ſhip was not materially injured, it was held upon an information filed by the attorney general, that the goods were liable to the duties.

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Lord ELLENBOROUGH.—I make no doubt that was a very ſound conſtruction of a fiſcal law. But I am of opinion there was here a clear ſtranding within the meaning of the memorandum. It is not merely touching the ground that conſtitutes a ſtranding. If the ſhip touches and runs, the circumſtance is not to be regarded. There ſhe is never in a quieſcent ſtate. But if ſhe is forced a-ſhore, or is driven on a bank, and remains for any time upon the ground, this is a ſtranding, without reference to the degree of damage ſhe thereby ſuſtains. To remove all doubt upon the queſtion, this clauſe is introduced. The ſtranding is a condition precedent, and when that is fulfilled the warranty againſt particular average ceaſes to have any operation.

The plaintiff recovered the amount of his demand.

Park and *Marryat* for the plaintiff.

Scarlett and *Storks* for the defendant.

[Attornies, *Cannon* and *Mills*.]

So a ſhip having run on ſome wooden piles four feet under water, erected about nine yards from the ſhore to keep up the banks of the river; and having lain on theſe piles till they were cut away;—this was held to be a ſtranding within the meaning of the memorandum. Dobſon v. Bolton, Marſh. 239. But it was decided that there had been no ſuch ſtranding, where a ſhip in the river Thames was run foul of by two other veſſels, and being thereby driven a-ground, remained faſt for an hour. Baring v. Henkle, Marſh, 240.

Wednesday, July 28.

REX v. VERELST, Esq.

Upon an indictment for perjury before a surrogate in the ecclesiastical court, the fact of the person who administered the oath having acted as a surrogate is sufficient primâ facie evidence of his being duly appointed and having authority to administer the oath.

But if it appear that the surrogate was appointed contrary to the canon which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf, his appointment is a nullity, and the averment that he had authority to administer the oath is negatived.

THIS was an indictment for perjury in an answer to an *allegation* in the ecclesiastical court. The indictment stated that on the 2d day of December 1811, a certain *allegation* was exhibited in the consistorial and episcopal court of London, before the worshipful *Samuel Pearce Parson*, doctor of laws and surrogate of the Right Honourable Sir WM. SCOTT knight, doctor of laws, vicar general of the Right Reverend Father in God the Lord Bishop of London, and official principal of his consistorial and episcopal court of London, by and on the part and behalf of *Elizabeth Amelia Verelst*, wife of the defendant, in a certain cause then depending, and before them instituted in the said court by the said defendant, for the purpose of procuring a divorce and separation from bed, board and mutual co-habitation with his said wife by reason of adultery. Mrs. *Verelst's allegation*, imputing adultery to the defendant, was then set out. The indictment proceeded afterwards to aver, that the said allegation was admitted by the said court, and that the defendant on the 12th July 1812 came in person before the said *Samuel Pearce Parson* surrogate as aforesaid, and was sworn and took his corporal oath before him, that his answer to the matters in the said *allegation* should contain the truth, the whole truth, and nothing but the truth, without favour or affection to his own cause, the said *Samuel Pearce Parson* having competent authority to administer the said oath; and that

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that the ſaid defendant upon his oath exhibited as true his anſwer in writing to the matters contained in the ſaid *allegation*. A part of the anſwer was then ſet forth, upon which the aſſignments of perjury were framed. Plea, not guilty.

The original anſwer was put in, which had been ſworn to by the defendant before Dr. *Parſon*, as ſurrogate of Sir WM. SCOTT, and it was proved that Dr. *Parſon* had been in the habit of acting in that capacity.

The defendant's counſel objected that evidence was neceſſary of Dr. *Parſon*'s appointment; otherwiſe, the averment would not be ſupported that he had competent authority to adminiſter the oath. Credit is given to the judges and magiſtrates of the common law, that they are duly appointed to the offices in which they act, but this has never been extended to the eccleſiaſtical courts, which are not courts of record, and which have always been looked to with peculiar jealouſy.

Lord ELLENBOROUGH.—I think the fact of Dr. Parſon having acted as ſurrogate, is ſufficient *primâ facie* evidence that he was duly appointed and had competent authority to adminiſter the oath. I cannot for this purpoſe make any diſtinction between the eccleſiaſtical courts and other juriſdictions. It is a general preſumption of law that a perſon acting in a public capacity is duly authorized ſo to do. (*a*)

(*a*) *Vide* REX v. JONES, 2 Campb. 131.

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The defendant's counſel then put in the regiſtrar's book, containing Dr. *Parſon's* appointment by Sir Wm. Scott. This entry was in the hand-writing of one *Grojan*, the regiſtrar's clerk, and bore date 14th May 1793. The appointment was in the common form of an act of court; but inſtead of being authenticated in the uſual manner, was ſtated to have taken place, "*Preſent* *Notary Public.*" There was not the name of any notary mentioned, and neither the regiſtrar nor his deputy had been preſent at the time. Parol evidence was given, that by the practice of the eccleſiaſtical courts, a notary public, or ſome higher officer, ſhould be preſent at every act of court for the purpoſe of authenticating it. In confirmation of this, *Can.* 123 was cited, whereby it is declared, that "No chancellor, commiſſary, archdeacon, official, or any other perſon uſing eccleſiaſtical juriſdiction, ſhall ſpeed any judicial act either of contentious or voluntary juriſdiction, except he have the ordinary regiſter of that court, or his lawful deputy; or if he or they will not or cannot be preſent, then ſuch perſons as by law are allowed in that behalf, to write or ſpeed the ſame, under pain of ſuſpenſion, ipſo facto." Upon which *Gibſon* obſerves, "And this is according to the rule of the antient canon law; which, to prevent falſifications, requireth the acts to be written by ſome public perſon (if he may be had) or elſe by two other credible perſons, and the credit which the canon law gives to a notary public is, that his teſtimony ſhall be equal to that of two witneſſes." Gibſ. 996. 3 Burn. Eccl. Law 285. It was argued that on theſe grounds Dr. *Parſon's* appointment was a nullity, and that he had no authority to adminiſter the oath.

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The counsel for the prosecution contended, that Dr. *Parson* having acted as surrogate for twenty years without his authority being questioned in the ecclesiastical court, a judge and jury at nisi prius ought not to inquire into the manner of his appointment; that if they did, they might still presume a notary was present, although a blank was left for the name in the entry; that the entry was not the appointment, but only the evidence of it; that the appointment might be regular although the entry was deficient; and that even if no notary was present, it did not follow that the appointment was a nullity, although the judge might be liable to suspension.

Lord ELLENBOROUGH.—I cannot shut out evidence that Dr. *Parson* was not duly appointed a surrogate, however long he may have acted in that capacity. The presumption arising from his acting, only stands till the contrary is proved.—The canon requires that every act either of contentious or voluntary jurisdiction shall take place in the presence of the register or his deputy, or such other person as is by law allowed in that behalf. The appointment of a surrogate is an act of voluntary jurisdiction. To be valid, it ought therefore to take place in the presence of the register, or his deputy, or such other person as is by law allowed in that behalf, that is to say, of a notary public. But Dr. *Parson's* supposed appointment did not take place either in the presence of the register, or his deputy, or of a notary public. I must judge of the manner in which it took place by the entry which records it. That entry leaves a blank for the name of a notary public. This affords evidence that a notary public was the officer meant to authenticate

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authenticate the act, but that no one attended. I am therefore of opinion, that the allegation that Dr. *Parſon* had competent authority to adminiſter the oath is negatived. Such authority would have been conferred by an appointment according to the canon, in the preſence of the regiſter or his deputy, or a notary public. An appointment contrary to the canon, where no ſuch perſon was preſent, I muſt treat as a nullity.

The Defendant was thereupon acquitted.

Scarlett and *Bolland* for the proſecution.

Park, *Topping*, *Gurney*, and *Alley* for the Defendant.

[Attornies *Clarke* and *Harmer*.]

" It ſeemeth clear that no " oath whatſoever taken before " thoſe who take upon them to " adminiſter juſtice by virtue of " an authority ſeemingly co- " lourable, but in truth un- " warranted and merely void, " can ever amount to perjury " in the eye of the law: And " from the ſame ground it " ſeemeth alſo clearly to follow, " that no falſe oath in an affi- " davit made before perſons " falſely pretending to be au- " thorized by a court of juſtice " to take affidavits, in relation " to matters depending before " ſuch court, can properly be " called perjury, becauſe no af- " fidavit is any way regarded, " unleſs it be made before per- " ſons legally intruſted with a " power to take it." 1 Hawk. P. C. c. 69. ſ. 4.

INGLIS *v.* VAUX.

Thurſday, July 29.

Where a ſhip inſured to Martinique and all or any of the windward and leeward iſlands, landed the greateſt part of her cargo at Martinique, and ſailed with the reſidue to Antigua, where ſhe was wrecked while ſtopping partly to diſpoſe of the reſidue of the outward cargo, and partly to obtain a homeward cargo, *held* that the underwriters were not liable.

THIS was an action on a policy of inſurance on the ſhip *Speculation*, at and from Liverpool to Martinique, and all or any of the Windward and Leeward Iſlands, with liberty to touch at any ports or places whatſoever, to take on board and land goods, ſtores, &c."

The ſhip ſailed from *Liverpool* on the 13th March 1811, and arrived at *Martinique* about the 20th May following. There the captain diſpoſed of all his outward cargo, except a ſmall quantity of lime and bricks. With theſe he ſailed for *Antigua*, where he arrived on the 31ſt of the ſame month. Here the ſhip lay till the 8th of July, when ſhe was wrecked in a hurricane, with the lime and bricks ſtill on board. The captain had not been able in the meanwhile to obtain a freight home; and being now examined as a witneſs, he ſtated that he ſtopped at *Antigua* partly to diſpoſe of the outward cargo, and partly to procure a homeward cargo.

The plaintiff's counſel contended, that the underwriters continued liable on the policy at the time of the loſs, as the outward adventure was not then completed. There being no market for the lime and bricks at *Antigua*, the ſhip had a right to ſail, under the protection of the inſurance, to any of the other windward or leeward iſlands, ſo that ſhe took them in geographical order, and according to the common courſe of navigation.

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Lord ELLENBOROUGH.—The captain had no right to mix up together the two objects, of disposing of the remnant of the outward cargo, and procuring a homeward cargo, at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceased to be the sole reason for his stay at *Antigua*, these underwriters were discharged.

Verdict for the Defendant.

Park, *Carr*, and *Erskine* for the plaintiff.

Scarlett and *Storks* for the defendant.

[Attornies, *Gregg* and *Mills*.]

Vide Emerig. tom. 1. p. 72. *acc*.

Thursday, July 29.

COWLEY *v.* WM. ROBERTSON and MARY his Wife.

Under a plea of the general issue to an action of assumpsit against husband and wife for goods sold to the wife before the marriage, it is competent to prove that she was then married to another husband who is still alive.

INDEBITATUS assumpsit for goods sold and delivered to the wife before her intermarriage with the defendant *Wm. Robertson*, which she promised to pay for. Plea, non assumpsit.

It was proved that the goods were sold and delivered to the defendant *Mary*, before her intermarriage with *Wm. Robertson*, and while she was living as the widow of one *Matthew Tittery Gilley*.

Park

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Park for the defendants propoſed to prove that this *Matthew Tittery Gilley* was then and ſtill is alive.

Topping, contra, maintained that this was not competent evidence under the general iſſue, and that bigamy could not be ſet up as a defence to the action.

Lord ELLENBOROUGH. The defendant *Mary* did not undertake in manner and form, if ſhe had a huſband then alive. By law, ſhe was incompetent to enter into any contract; the previous coverture therefore, ſupports the general iſſue. Nor do I think there is any eſtoppel to prevent the defendants from giving it in evidence. The plea, as framed, is no acknowledgment that they are huſband and wife. They are only connected on the record by being ſued jointly. Although ſhe ſhould have married a ſecond time, her former huſband being ſtill alive, it does not neceſſarily follow that ſhe was guilty of a crime for which ſhe is liable to puniſhment.

It was proved that ſhe was married to *M. T. Gilley* on the 24th Dec. 1791; that he ſoon afterwards went to *Barbadoes*; that for ſeveral years no accounts of him were received; that in 1805 ſhe and his family, believing him to be dead, went into mourning for him; that on the 3d July 1808 ſhe married the defendant *Robertſon*; and that ſince the commencement of the action a letter has been received from *Gilley*, ſtating, that after many ſtrange adventures he had returned to *Barbadoes*, and making anxious enquiries after his wife and child.

The Plaintiff ſubmitted to be nonſuited.

Topping

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Topping and *Gurney* for the Plaintiff.

Park and *Marryat* for the Defendants.

[Attornies, *Sweet* and *Swain*.]

Thurſday, July 29.

ANDERSON *v.* WALLIS.

Where goods were inſured "at and from London to Quebec, warranted free of particular average," and the ſhip was driven back from the banks of Newfoundland and obliged to put into Kinſale, where it was impoſſible to repair her ſo as to enable her to complete the voyage the ſame ſeaſon, and the goods, which though not of a periſhable nature were to a certain degree damaged, could not be forwarded the ſame ſeaſon by any other conveyance;—*held* that the aſſured could not by giving notice of abandonment come upon the underwriters for a total loſs.

POLICY on goods at and from London to Quebec, warranted free of particular average.

The ſhip ſailed on the 16th September 1811. She met with ſtormy weather off the Banks of Newfoundland which drove her back, and ſhe was obliged to put into Kinſale on the 25th of October. It was impoſſible to repair her ſo as to complete the voyage that ſeaſon, or to forward the cargo by any other ſhip. The goods inſured conſiſting of iron, copper and nails, were found in ſome degree damaged by the ſalt water. The aſſured gave regular notice of abandonment.

Lord ELLENBOROUGH.—I conceive the mere loſs of the voyage would not have been ſufficient to entitle the aſſured to abandon. If the goods had ſuffered no damage, and not being of a periſhable nature might have been kept and forwarded to Quebec in a ſound ſtate the following ſpring, I do not ſee on what ground it could have been ſaid they were totally loſt, or that this loſs ſhould be thrown upon the underwriters. However, it may be fit that the effect

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of the goods being to a certain degree damaged ſhould be further conſidered; and on that ground the plaintiff may take a verdict, with liberty for the defendant to move to enter a nonſuit.

Accordingly, the caſe was afterwards brought before the court; when Lord ELLENBOROUGH agreed with the other judges, that the aſſured had not a right to abandon, and that the loſs not being total, the aſſured had no right to recover.

Nonſuit entered.

Park, *Carr* and *Wylde*, for the plaintiff.

Topping and *Richardſon* for the defendant.

[Attornies, *Wilde* and *Willis*.]

Vide Wilſon v. Royal Exchange Aſſ. Co. 2 Campb. 623.

Saturday, July 31.

PATRICK v. EAMES.

Where there is a valued policy on freight, and the ſhip is loſt while taking in her cargo, the aſſured can only recover for the freight of the goods actually on board, unleſs a full cargo be then provided for her, or there be a contract either written or parol to ſupply one.

THIS was an action on a policy of inſurance on the freight of the ſhip *Jane*, valued at £4,000. at and from the ſhip's port or ports of loading in all or any of the *Cape de Verd Iſlands*, to *Liverpool*.

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The Jane was purchaſed at Sierra Leone by Meſſrs. Taylor and Waldron, in whom the intereſt was averred. Their plan was, that ſhe ſhould take in a complete cargo of *orchella weed*, a plant picked from the rocks in the Cape de Verd Iſlands. They expected that this would be ſupplied by Don Emanuel Martinus, the governor. It was ſuggeſted that he had verbally undertaken to do ſo; but there was no evidence adduced of any binding agreement upon the ſubject. The ſhip arrived at St. Nicholas, one of the Cape de Verds, on the 10th Auguſt 1812, and took in 150 bags of orchella weed. The next day, a ſtorm came on, and ſhe was totally wrecked. It did not appear that there was more orchella weed then ready to be put on board; but there were perſons employed in St. Nicholas and the other iſlands to pick and prepare what ſhould be a ſufficient quantity to fill the ſhip.

The defendant paid into court a ſufficient ſum to cover the freight of the 150 bags of orchella weed on board when the ſhip was wrecked, and the return of premium for ſhort intereſt.

Park, for the aſſured, contended, on the authority of Montgomery v. Eggington, 3 T. R. 362. that they were entitled to recover for a total loſs.

Lord ELLENBOROUGH.—If a contract had been proved for ſupplying this ſhip with a full cargo at a ſtipulated rate of freight, it would have appeared that, by the event which has happened, the aſſured have been deprived of a profit which they muſt other-

wise have certainly received; and they would have had a right to resort to the underwriters for a full indemnity. Nor should I have considered it material whether that contract was or was not under seal, or whether it was written, or merely verbal. This circumstance only varies the mode of proof, without altering the principle on which the rights of the parties depend. But here no contract of any sort is proved for loading the ship. Beyond the 150 bags of orchella weed actually on board, the interest of the assured was merely in expectation. For any thing that appears, Don Emanuel Martinus might have refused to send on board another bag, without subjecting himself to an action; and although the storm had never arisen, the ship might have been obliged to return to Liverpool nearly empty. The loss of freight which the assured now demand, therefore, did not necessarily arise from the event against which the underwriters undertook to indemnify them.

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PATRICK v. EAMES.

Plaintiff nonsuited.

Park, *Scarlett*, and *Littledale*, for the plaintiff.

Topping, *Marryat*, and *Campbell*, for the defendant.

[Attornies, *Dacie* and *Blunt*.]

Vide Forbes v. Aspinall, 13 East, 323. Forbes v. Cowie, 1 Campb. 520.

OXFORD CIRCUIT.

SUMMER ASSIZES, 53 GEORGE III.

STAFFORD.

CROWN SIDE. Coram DAMPIER, J.

1813.
Monday, Aug. 9.

REX *v.* COTTON.

Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant is bound to repair *ratione tenuræ*, an award made under a submission by a former tenant for years of the premises can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*.

THIS was an indictment for not repairing a highway in the townſhip of Alveton, in the county of Stafford, which it was alleged that the defendant was bound to repair by reaſon of his tenure and occupation of a certain farm and lands called *Netherfield Farm*, ſituate in the ſaid townſhip. Plea, *Not Guilty*.

The queſtion was, whether the tenant and occupier of *Netherfield Farm* was bound to repair this road, or the obligation lay on the townſhip at large?

The counſel for the proſecution offered as concluſive evidence a bond, executed in the year 1754 by the then occupier of *Netherfield Farm*, who held it as tenant to Lord Shrewſbury, conditioned to abide by the award of *J. Gilbert* Eſquire, a neighbouring magiſtrate, now deceaſed, on this very queſtion; and the award of Mr. *Gilbert* made thereupon, determin-

ing that the tenant and occupier of *Netherfield Farm*, and not the townſhip, was bound to keep the road in repair.—But,

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DAMPIER, J. was clearly of opinion, that the bond could not be received in evidence at all, as the tenant had no right to bind his landlord; and that he could not receive the other document as *an award*, whatever effect it might have as evidence of *reputation*.

Abbott, for the defendant, then objected, that it was not admiſſible as evidence of reputation, being *poſt litem motam*, and cited the *Berkeley Peerage Caſe* before the Houſe of Lords, in which it was decided, that no declaration could be given in evidence which had been made after the controverſy on the queſtion at iſſue had ariſen.

Peake, contra, inſiſted that as Mr. *Gilbert* was no party to the diſpute, and had no intereſt in it, his award was evidence of reputation. It amounted to a declaration by him of the reputation in the townſhip before the diſpute aroſe. If by word of mouth or in a letter to a friend he had expreſſed his opinion upon the reputed liability to repair the road, that might ſurely have been given in evidence, and his declaration cannot be leſs receivable becauſe it is on parchment and under ſeal.

Dampier, J. This is a queſtion of conſiderable importance and of ſome novelty. I wiſh that my opinion upon it could be reviewed; but in the manner in which it ariſes, that is impoſſible; and I muſt diſpoſe of it at

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once in the beſt manner I can. I have certainly had the advantage of hearing it ably argued on both ſides. The award muſt either be received as an adjudication or as evidence of reputation. I have already ſaid I cannot receive it as an adjudication, for it could only be binding on the individual who was a party to the ſubmiſſion, and could not affect Lord Shrewſbury, who was ſeized in fee of the premiſes, or any perſon ſubſequently holding under him. I am likewiſe of opinion that it is not admiſſible as evidence of reputation. The reaſon why the declarations of deceaſed perſons upon public rights made *ante litem motam*, when there was no exiſting diſpute reſpecting them, is, that theſe declarations are conſidered as diſintereſted, diſpaſſionate, and made without any intention to ſerve a cauſe, or to miſlead poſterity. But the caſe is entirely altered *poſt litem motam*, when a controverſy has ariſen reſpecting the point to which the declarations apply. Declarations then made are ſo likely to be produced by intereſt, prejudice or paſſion, that no reliance can ſafely be placed upon them, and they would more frequently impoſe upon the underſtanding than conduce to the elucidation of truth. It has therefore been wiſely decided, that evidence of reputation ariſing *poſt litem motam* ſhall not be admitted.—Was there not *lis mota* at the time this award was executed by Mr. Gilbert? The very ſubmiſſion to him ſhews, that the queſtion was then agitated between the townſhip of Alveton and the occupier of Netherfield Farm, which of them was bound to repair this highway? What deceaſed witneſſes then ſtated to the arbitrator, would not be receivable; and his opinion formed upon that, and expreſſed in his award, cannot be entitled to more credit.

The

The defendant had a verdict.

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Peake and *Barnes* for the profecution.

Abbott and *Petit* for the defendant.

SHREWSBURY.

Coram DAMPIER J.

Friday, Aug. 18.

DOE d. MORGAN, Clerk, *v.* BLUCK.

Where a notice to quit, given by a rector to the tenant of his glebe land expired on the 25th of Dec. and on the 17th of Jan. following a ſequeſtration was read in the church, and the rector afterwards by order of the ſequeſtrator, received from the tenant, who held over, a weekly allowance, which he deſcribed in a receipt as iſſuing out of the tithe and glebe;—held that the rector might ſtill maintain an ejectment, laying the demiſe on the 18 of Jan. as between the 25th of Dec. and the 17th of Jan. the tenant was a treſpaſſer.

THIS was an ejectment brought by the rector of the pariſh of Tugford, to recover poſſeſſion of the glebe lands of the ſaid pariſh, againſt a perſon who had held them as his tenant from year to year. The demiſe was laid on the 1ſt of Jan. 1813.

A *prima facie* caſe was made for the leſſor of the plaintiff, by proving a receipt for rent to Chriſtmas 1812, and a notice to quit at that time ſerved on the defendant the 18th of June preceding.

The defence was, that the rector was not in a ſituation to maintain this ejectment, on account of a ſequeſtration of the living, and the proceedings thereupon.

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Doe d. Morgan Clerk, v. Blück.

The judgement on which the ſequeſtration was founded was not proved; but the defendant gave in evidence a writ of levari facias, directed to the biſhop of Hereford, teſted the 28th Nov. 1812, the laſt day of Michaelmas term. On the 28th Dec. following, this was indorſed by the biſhop, "Let ſequeſtration iſſue." The ſequeſtration, directed to one Watkins, did iſſue the 3d January 1813, and was read in the pariſh church on the 17th of the ſame month.

In February a meeting of the pariſhioners took place, at which the defendant was preſent, to conſider how they were to pay their tithes, &c.—and two perſons were deputed to ſpeak upon that ſubject to the rector. He referred them to Watkins the ſequeſtrator. Watkins deſired that the defendant, who occupied a farm in the pariſh, ſhould pay the rector a guinea and a half a week for ſerving the cure, but gave no other directions with reſpect to the tithes or glebe land, or (as far as appeared) at all intermeddled with the affairs of the living. The defendant paid the rector the weekly allowance of a guinea and a half; for which, in July, the latter gave a written receipt, as iſſuing out of the tithe and glebe. An offer had been made a ſhort time before the trial, to pay the money for which the ſequeſtration iſſued.

Dauncey and *Abbott* contended, that under theſe circumſtances the ejectment could not be ſupported. By the iſſuing of the ſequeſtration the rights of the rector were completely ſuſpended. The ſequeſtrator and not the rector was entitled to the poſſeſſion of the glebe

glebe lands, as well as to the receipt of the tithes. Beſides, by the voluntary act of the rector himſelf, he had waived the notice to quit, and affirmed the tenancy. The guinea and a half a week was tantamount to the payment of rent, and it was expreſſed to be for the rent of the glebe land in the written receipt ſigned by the rector himſelf. It is clear that he is not now entitled to the poſſeſſion of the glebe land; and even ſuppoſing that there was a ſhort interval after the expiration of the notice to quit when the defendant might be conſidered as a treſpaſſer, he ceaſed to be ſo when the ſequeſtration had taken full effect, and he was now entitled to retain poſſeſſion of the premiſes. A writ of *habere facias poſſeſſionem* therefore can no longer be ſued out, and the ejectment cannot be ſupported.

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DAMPIER, J. The ſequeſtration did not take effect till the 17th of January, when it was read in the pariſh church. The notice to quit expired on the 25th of December. Between theſe two days the defendant was a treſpaſſer. I think the rector is not now entitled to the poſſeſſion of the glebe lands, and that he cannot ſue out a writ of *habere facias poſſeſſionem* in this action. Regularly, the judgement on which the ſequeſtration iſſued ſhould have been produced; but the neceſſity for that is obviated by the rector's recognition of the validity of the ſequeſtration, and that recognition refers back to the 17th of January, when it was publiſhed in the church. From that day he is not entitled to the rents and profits of the glebe lands, while the ſequeſtration remains in force; but he is entitled to

ſuch

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such rents and profits down to that time from the expiration of the notice to quit. For this reason I think the ejectment maintainable. The present is like the case of tenant for life dying pending an ejectment. Possession is not to be recovered, but the ejectment is the medium through which the party may recover the mesne profits of the lands.

The lessor of the plaintiff had a verdict.

In the ensuing term, *Abbott* moved the court of K. B. for a rule to shew cause why the verdict should not be set aside and a new trial granted; or why the lessor of the plaintiff should not be restrained from taking out execution upon the judgement. But the court fully approved of the direction given by the learned judge at Nisi Prius; and said, it would be time enough to consider in what shape the lessor of the plaintiff was entitled to execution when it appeared that he meant to disturb the possession of the defendant.

Rule refused.

Jervis and *Campbell* for the lessor of the plaintiff.

Dauncey and *Abbott* for the defendant.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

54 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

DENEW *v.* DAVERELL, Esq.

Tuesday, Nov. 30.

ACTION for work and labour, money paid, &c.

If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor.

The plaintiff, who is an auctioneer, was employed by the defendant, a gentleman of fortune, to sell for him a leasehold house in Grosvenor-street. The plaintiff advertised the house, and made out a particular of the conditions of sale, which was submitted to the defendant, and which he approved of. This did not contain any proviso that the vendor was not to be called upon to shew the title of the lessor. The lease of the house was bought upon this particular by Lord Bolton, who immediately called upon Mr. Daverell to shew that Lord Grosvenor, the lessor, had power to grant the lease. A bill being filed for a specific performance, the Chancellor held, that the vendor, without an express stipulation to the contrary, was bound to shew

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DENEW v. DAVERELL, Esq.

shew the title of the lessor, and Mr. Denew was not in a situation to do so. Lord Bolton accordingly brought an action against the auctioneer, and recovered back his deposit. The amount of the damages and costs in that action was now paid into court. The plaintiff sought to recover farther two and a half per cent. commission upon the sum for which the lease was sold to Lord Bolton.

The defence was, the plaintiff's negligence in conducting the sale; and several witnesses were called, who stated that it has been the constant usage of auctioneers, for a number of years, when employed to sell leasehold property, to insert a proviso in the particular, that the vendor shall not be called upon to shew the title of the landlord.

Garrow, A. G. for the plaintiff, insisted this was no defence to the action,—more especially as the defendant himself had seen and approved of the particular under which the house was sold.

Lord ELLENBOROUGH. Where there is a special contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross action for any negligence he complains of. But where the plaintiff proceeds, as here, upon a quantum meruit, I have no doubt that the just value of his services may be appreciated, and that if they are found to have been wholly abortive, he is entitled to recover no compensation. In the present case, the plaintiff appears to have been guilty of gross negligence, and the defendant has suffered an injury

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injury instead of deriving any benefit from employing him. A practice has very properly sprung up among auctioneers in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called upon to shew the title of the lessor. The plaintiff was bound to take notice of that practice, and to insert such a clause in the particulars of sale of the defendant's house. Had this been done, the defendant would have been secure, and Lord Bolton must have completed the purchase. By the omission, the defendant has the house thrown back upon his hands with expensive litigation. It is no answer that the particulars were shewn to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for a recompence, although from a misplaced confidence I followed his advice without remonstrance or suspicion.

The Jury found a verdict for the defendant.

Garrow, A. G. and *Comyn*, for the plaintiff.

Topping and *Bowen* for the defendant.

[Attornies, *Grenwell* and *Strong*.]

Vide Farnsworth v. Garrard, 1 Campb. 38.

GREGORY

Tuesday, Nov. 30.

GREGORY *v.* FRASER.

Although a promiſſory-note without a ſtamp cannot be received in evidence as a ſecurity, or to prove the loan of money, it may be looked at by the jury with a view to aſcertain a collateral fact.

THIS was an action for money lent.

The witneſſes for the plaintiff, who keeps a billiard table, ſtated, that on the evening of the 25th of May laſt he lent £40. to the defendant, who gave a promiſſory note for the amount on an unſtamped piece of paper, which was produced by the plaintiff.

The defendant's caſe was, that he had been made drunk by the plaintiff, and induced to write a promiſſory note for £40., no part of which ſum he had received.

Lord ELLENBOROUGH.—The note certainly cannot be received in evidence as a ſecurity, or to prove the loan of the money; but I think it may be looked at by the jury as a cotemporary writing to prove or diſprove the fraud imputed to the plaintiff.

The note was accordingly put in, and had very much the appearance of being written by a man in a ſtate of intoxication.

The jury found a verdict for the defendant.

Park and *Comyn* for the plaintiff.

Garrow, A. G. and *Adam*, for the defendant.

[Attornies, *Boot* and *Hoare*.]

Vide Rex v. Pendleton, 15 Eaſt, 449. Morton's Caſe, 2 Eaſt, P. C. 955.

HUNTER v. BRITTS.

Friday, Dec. 3.

TRESPASS for meſne profits and coſts of ejectment.

Where premiſes are in the poſſeſſion of a tenant, and there is judgement in ejectment againſt the caſual ejector, in an action for meſne profits and coſts of ejectment againſt the landlord, the judgement in ejectment is no evidence againſt him, without proof that he had notice of the ejectment, ſo that he might have come in to defend it; but a ſubſequent promiſe by him to pay the rent and coſts amounts to an admiſſion that he is liable to the action.

There was judgement in ejectment againſt the caſual ejector. The defendant was landlord of the premiſes, and proved to have been in the receipt of the rents and profits from the time of the demiſe till the writ of poſſeſſion was executed. The ejectment was ſerved upon the tenant. There was no evidence that the defendant had notice of this till after judgement; but ſubſequently to that he promiſed to pay the rent and the coſts to the plaintiff.

Marryat for the defendant contended, That upon this proof the action could not be maintained. The judgement in ejectment was evidence of title only between thoſe who were privy to it. But the defendant's name not only did not appear on that record, but he was wholly ignorant of the proceeding till after judgement was ſigned. He might have had an undoubted title to the premiſes, and might have been able to make a complete defence to the ejectment if he had had the opportunity. He could not be bound, therefore, by the judgement in ejectment which was obtained behind his back. His ſubſequent promiſe might render him liable in aſſumpſit; but could not have the effect of making him a treſpaſſer.

Lord ELLENBOROUGH thought that the judgement in ejectment was not evidence of title againſt the defendant

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HUNTER v. BRITTS.

fendant without notice of the ejectment; but that his subsequent promise amounted to an admission that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser.

Verdict for plaintiff.

Park and *Reader* for the plaintiff.

Marryat for the defendant.

Vide Bull. N. P. 87. Dunn v. White, 7 T. R. 112.

Saturday, Dec. 4.

SMITH *v.* FUGE the Younger.

In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of the defendant, and stating him to be sole owner, is no evidence of ownership.

THIS was an action for seaman's wages against the defendant as owner of the ship *Enterprize*.

To prove the ownership, the register was put in, which stated "*Robert Fuge*, the younger, of *Plymouth*" to be sole owner; and evidence was given that *Robert Fuge*, the younger, of Plymouth, was the defendant in this action.

Garrow, A. G., attempted to distinguish this case from *Tinkler* v. *Walpole*, 14 *East*, 226. as here the register represented the defendant as sole owner, and purported to be granted upon his own oath.

Lord ELLENBOROUGH.—The defendant cannot be charged through the medium of the register without direct proof that he took the oath, or adopted the character of owner. I have no doubt in my own mind, that

that he did take the oath, and that he is ſole owner of the veſſel; but for any thing that appears in evidence, he has no connection with her whatſoever; and a ſtranger may have taken the oath in his name.

1813.
SMITH v. FUGE the younger.

Plaintiff nonſuited.

Garrow A. G. and *Marryat* for the plaintiff.

Park and *Taddy* for the defendant.

Vide Flower v. Young, ante, 240.

HARRISON *v.* BLADES and another.

Monday, Dec. 6.

THIS was an action againſt the ſheriff of Middleſex for breaking and entering the plaintiff's houſe and taking his goods.

It is no ſufficient ground for receiving evidence of the handwriting of a witneſs which would be receivable if he were dead, that he is unable to attend the trial from indiſpoſition, and lies without hopes of recovery.

To prove that the plaintiff was in poſſeſſion of the houſe, he wiſhed to give evidence that he paid the taxes for it. For this purpoſe the tax-gatherer had attended under a ſubpœna during the ſittings till Saturday laſt, when he was ſeized with an apoplectic fit, and carried home in a very dangerous ſtate. Witneſſes were now examined, who ſwore, that when they left him this morning, he was given over by his phyſicians, and that he was *in extremis*.

Garrow, A. G., for the plaintiff, propoſed, under theſe circumſtances, to give in evidence the tax-ga-

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HARRISON v. BLADES and another.

therer's receipts, ſigned with his name, acknowledging that the taxes had been paid to him by the plaintiff as occupier of the houſe in queſtion. If the tax-gatherer were dead, theſe documents would clearly be evidence, as they charged him with the receipt of money, and were againſt his intereſt. So they would be equally admiſſible if he were in a foreign country, or in a ſtate of mental derangement. Upon the ſame principle they ought to be admitted in a caſe like this, where the attendance of the witneſs was phyſically impoſſible, and there was no chance of ever being able to examine him in perſon on any ſubſequent occaſion.

Lord ELLENBOROUGH.—I cannot diſpenſe with the attendance of a witneſs who is ſtill alive and within the juriſdiction of the court, ſo as to admit evidence of his hand-writing in the ſame manner as if he were actually dead: No caſe has yet gone ſo far, and I am afraid to eſtabliſh a precedent. It is difficult to determine when a patient is paſt all hope of cure. If ſuch a relaxation of the rules of evidence were permitted, there would be very ſudden indiſpoſitions and recoveries. Where a witneſs is taken ill, the party who would avail himſelf of his teſtimony muſt move to put off the trial. If he be in a very dangerous condition, he will probably be dead before the enſuing ſittings, and then evidence of his hand-writing may be received without any riſk of colluſion.

The plaintiff had a verdict.

Garrow, A. G., and *Eſpinaſſe* for the plaintiff.

Park and *Holt* for the defendants.

[Attornies, *Kiſt* and *Smith*.]

CARTER

ADJOURNED SITTINGS IN LONDON.

CARTER v. RING, Widow, Administratrix of JOSEPH RING, deceased. Thursday, Dec. 3.

DEBT on bond, dated 1st July 1807, in the penal sum of £3,800. to be paid by the said Joseph Ring to the plaintiff, when he the said Joseph Ring should be thereunto afterwards requested.

Where to debt on bond conditioned for the payment of a sum of money *on demand*, the defendant pleads that no demand was made, upon which issue is joined, the plaintiff must prove an express demand before action brought.

The bond had the following condition: "If the above-bounden Joseph Ring, his heirs, executors, or administrators, do well and truly pay or cause to be paid to the above-named Henry Carter, his executors, administrators, or assigns, the full sum of £1,900. of lawful money current in Great Britain, *on demand*, with lawful interest at the rate of 5 per cent. per annum until paid, then, &c."

The defendant after Oyer, pleaded that no demand of payment of the said sum of money in the said condition mentioned, or of any interest thereupon, was ever made by the plaintiff.—The plaintiff in his replication averred, that a demand was made by him upon the defendant as administratrix. Issue thereupon.

The question having arisen, whether express evidence of a demand was necessary,

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CARTER v. RING.

Jervis, for the plaintiff, inſiſted, that the bringing of the action was a ſufficient demand.

Abbott, contra.—The bond muſt have been forfeited before action brought, and it could not have been forfeited till demand made of the ſum of money mentioned in the condition. The ſtipulation as to the payment of intereſt clearly ſhews that the bond was not to be forfeited till default upon an actual demand. The plaintiff here ſeeks to recover the penalty, which is a collateral ſum, and the caſes with regard to payment of money on requeſt, where there is an antecedent duty, do not apply.

Lord ELLENBOROUGH was of opinion, that the plaintiff was bound to prove a demand before action brought.

A witneſs was afterwards found who did ſo, and the plaintiff had a verdict.

Jervis and *Eſpinaſſe* for the plaintiff.

Abbott for the defendant.

[Attornies, *Bigg* and *Vizard*.]

SMITH *v.* CAREY.

Thurſday, Dec. 9.

In an action for words which may be underſtood to convey a charge either of felony or fraud; altho' they would be actionable in the latter ſenſe as well as the former, if the declaration contains an innuendo that the defendant thereby meant to impute felony to the plaintiff, this is material, and muſt be made out in evidence.

ACTION for ſlander of plaintiff in his trade.

The words were, that "he lived by ſwindling and robbing the public." Theſe were laid differently in different counts of the declaration; but in each count there was an inuendo, that the defendant thereby meant "that the plaintiff had been and was guilty of *felony and robbery.*"

The words were proved as laid; but appeared to allude to a tranſaction, from which it might be inferred that the defendant only meant to charge the plaintiff with *a fraud.*

Lord ELLENBOROUGH ſaid, the words were in themſelves actionable, and if there had been no ſuch inuendo as to their meaning, the plaintiff would certainly have been entitled to a verdict; but the plaintiff was bound to ſhew they were ſpoken in the ſenſe he had aſcribed to them; and if the jury ſhould be ſatisfied they were ſpoken with intent to impute, not felony, but merely fraud, there muſt be a

Verdict for the defendant.

Topping and *Marryat* for the plaintiff.

Garrow, A. G. for the defendant.

[Attornies, *M'Michael* and *Sandford.*]

Vide Oldham v. Peake, 2 Bl. Rep. 959. Penfold v. Weſtcote, 2 New Rep. 335.

Friday, Dec. 10.

TYE *v.* FYNMORE.

Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description, it is not material for the vendor to shew that they correspond with a sample exhibited at the time of sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract.

THIS was an action for not accepting or paying for a quantity of saffafras, described in the sale note as "2 tons of fair merchantable sassafras wood, in logs, at 6 guineas *per cwt.*"

The defence was, that the saffafras was not of the sort the purchaser had a right to expect from the description in the sale note; that by "*saffafras wood*" the roots of the tree are understood in the trade; but that the wood sold by the plaintiff was part of the timber, which cannot be applied to the same purposes, and is not above one-sixth part of the value of the roots.

In answer to this it was proved, that the defendant is a druggist, and well skilled in articles of this sort; that the day before the contract was entered into, a specimen of the wood sold was exhibited to him; that he kept it the following night, and that he had a full opportunity to examine it.

Lord ELLENBOROUGH.—This is not a sale by sample. It is not enough for the plaintiff to prove that the wood corresponds in quality with the specimen exhibited to the defendant before the sale. The question is, whether it was in the understanding of the trade "fair merchantable saffafras wood;" which it is clearly proved not to have been. It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise

exercise his skill, having an express undertaking from the vendor as to the quality of the commodity.

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TYE v. FYNMORE.

Plaintiff nonsuited.

Garrow, A. G. and *Lawes*, for the plaintiff.

Park and *Gurney* for the defendant.

[Attornies, *Edis* and *Finmore*.]

HODGE *v.* FILLIS and others.

Saturday, Dec. 11.

THIS was an action by the indorsee against the acceptors of a bill of exchange drawn in the following form:

" £2,314. 15. 11. " Cork, 12 April 1813.

" At 2 months date of this our first of exchange " (second and third of same tenor and date not paid) " pay to our order £2,314. 15. 11. and charge the " same to account as advised.

" W. & A. Maxwell.

" To Messrs. Fillis & Co. Plymouth, " Payable in London."

Where the drawer of a bill of exchange makes it payable at a particular place, this is part of the contract, and must be mentioned in describing the bill in the declaration. Where a bill of exchange is drawn payable in London, and it is accepted payable at a London bankers, in an action against the acceptor, a presentment for payment there is a material averment, and must be proved at the trial.

The bill was accepted by the defendants, " payable at Sir John Perring's and Co., Bankers, London."

The first count of the declaration did not state that the bill was made payable at any particular place either by the drawers or acceptors. The second count stated,

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that it was drawn payable in London, and accepted payable at Perring & Co.'s, and contained an averment, that when due it was presented there for payment.—The plaintiff having proved the partnership of the defendants, their handwriting as acceptors, and the indorsement of W. & A. Maxwell, closed his case.

Giffard, for the defendants, contended, that upon this evidence the plaintiff was not entitled to a verdict. He could not recover on the first count, for that did not properly describe the bill of exchange. The circumstance of the bill being made payable in London was an essential part of the original contract.—The second count described the bill properly; but contained a material averment which had not been proved, viz. that the bill was presented, when due, at the bankers in London, where it was made payable by the acceptors. Without at all considering the effect of an acceptance making the bill payable at a particular place where it was drawn without any mention of a place of payment, there could be no doubt that where a particular place of payment is denoted both by drawers and acceptors, that becomes a term of the contract between the parties, and an averment that the bill was presented for payment there cannot possibly be rejected as irrelevant.

Lord ELLENBOROUGH expressed himself to be of this opinion.

The plaintiff's counsel then proved, that after the bill was due one of the defendants promised to pay it, which

which Lord Ellenborough held dispensed with direct evidence of a presentment for payment at the bankers, and

The plaintiff had a verdict.

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Garrow, A. G., and *Gaselee* for the plaintiff.

Giffard for the defendants.

[Attornies, *Makinson* and *Dorke*.]

Vide Callaghan v. Aylett, 3 Taunt. 397. 2 Campb. 549. Fenton v. Goundry, 13 East, 459. Sanderson v. Bowes, 14 East, 500. Huffam v. Ellis, 3 Taunt. 415. Gammon v. Schmoll, 5 Taunt. 344.

SMITH v. LYON.

Wednesday, Dec. 15.

In an action by the master of a ship for freight, the declarations of the owner for whose benefit the action is brought, are evidence for the defendant.

THIS was an action of assumpsit upon a memorandum for charter between the plaintiff, as master of a ship called the James and Anne, and the defendant, a merchant in London, for a voyage from the river Thames to Heligoland or Hamburgh.

The defence rested upon something supposed to have been said by a Mr. *Fagg*, the owner of the ship, amounting to a declaration that she was not sea-worthy, or to a consent to rescind the contract entirely. A witness being called to relate the conversation between the defendant and Mr. *Fagg* when this was alleged to have passed;

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Garrow, A. G., for the plaintiff, contended, that as *Fagg* was no party to this action, he ought himself to be called as a witness. He would be coming to speak against his interest; therefore there was no objection to his competency; and he could give the best evidence of what he actually said, and of the circumstances which gave rise to the conversation.

Lord ELLENBOROUGH.—Although this action is in the name of the master, it is brought for the benefit of the owner. I am therefore of opinion, that any thing said by the latter is admissible evidence for the defendant.

The declaration, however, did not turn out to be what was expected; and

The plaintiff had a verdict.

Garrow, A. G., *Marryat*, and *Campbell*, for the plaintiff.

Park and *Gurney* for the defendant.

[Attornies, *Williams* and *Burt*.]

Vide Rex v. Hardwick, 11 East, 578. Hart v. Horn, 2 Campb. 92.

BRUCE and others v. HUNTER.

Wednesday, Dec. 15.

THIS was an action of assumpsit to recover the balance of an account,

An agent who has advanced money for his principal in effecting insurances and other mercantile business, is entitled to charge interest, and at the end of every year to make a rest and add the interest then due to the principal.

The plaintiffs had effected insurances and advanced the premiums for the defendant, and had transacted other business as agents for him, from the year 1801 down to the present time. They had delivered an account to him annually, and at the close of each year, from the expiration of the first, had charged interest; and at each rest the interest of the preceding year was added to the principal. It was proved that at the several times when the annual accounts were rendered to the defendant, he had never objected to the charge of interest until the year 1811, when he said that he was not bound to pay any interest.

It was now urged, on his behalf, that interest could not be recovered against him, and much less according to the calculation of the plaintiff, which amounted to compound interest,—a claim never allowed at law or in equity. But—

Lord ELLENBOROUGH said, that it was fair and reasonable the defendant should pay interest in the manner charged, and that the accounts, to which he had not objected for a number of years, afforded sufficient evidence of a promise on his part to pay interest in this manner.

One

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One of the special jury said, it was the uniform manner of making up accounts of this description.

Verdict for sum claimed.

Garrow, A. G., and *Carr* for the plaintiffs.

Littledale for the defendants.

[Attornies, *Gregg* and *Tennent*.]

Vide Calton v. Bragg, 15 East, 223.

Wednesday, Dec. 5.

PINHORN and others *v.* TUCKINGTON.

Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest afterwards.

THIS was an action for non-payment of money pursuant to an award, whereby the defendant was ordered to pay to the plaintiffs the sum of £1,950. due on a balance of accounts, on the 21st June 1812, between the hours of eleven and twelve, at Lloyd's Coffee-house.

The question being put, whether interest was recoverable on the award,

Lord ELLENBOROUGH held, that as the money was awarded to be paid on a certain day, interest ought to be allowed from that day, if payment was then demanded at the place appointed.

It was proved, that a person duly authorized by power of attorney, attended at Lloyd's Coffee-house to demand

demand payment between the hours of eleven and twelve on the 21st of January 1812; but that neither the defendant nor any person for him appeared. Whereupon the plaintiff recovered a verdict for the principal and interest from that day.

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Selwyn for the plaintiff.

The cause was undefended.

[Attornies, *Oakly* and *Hindman*.]

See the preceding case of Bruce v. Hunter.

WILLIAMS *v.* SHEE.

Thursday, Dec. 16.

THIS was an action on a policy of insurance on goods by the ship *Sir Sidney Smith*, "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation."

Where a ship was insured *from London to Berbice*, with an extensive liberty of touching and trading at all places; *held* that by putting into *Madeira* and staying there after the convoy with which she sailed had proceeded on the voyage, she was guilty of a deviation which discharged the underwriters.—*Semble*, that as the captain did not know when the convoy sailed away, and expected to overtake it, this was not *a deserting of convoy* within the meaning of the convoy act.

The vessel sailed from Portsmouth on the 25th September 1812, with a fleet for the West Indies, under convoy of His Majesty's ship Narcissus. They arrived off Madeira on Saturday the 17th of October. The *Sir Sidney Smith* had taken in a quantity of goods for that island, which the captain had been ordered to

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land there, and for which wines were to be sent on board. He began to land the goods as soon as he arrived, but not being allowed to work on the Sunday, he had not got the wines on board till the Monday at noon. The Narcissus with the greatest part of the fleet had sailed away the preceding day, and was then too far off to be overtaken. Seven or eight other ships belonging to the fleet, however, were left behind at Madeira; and they all agreed to sail together for mutual protection. With this view the *Sir Sidney Smith* remained at Madeira till the 24th of October. She finally parted company with them off Barbadoes, and on the 19th of November was captured by an American privateer on her way to Berbice. The owner of the goods insured was on board during the voyage.

Garrow, A. G., contended, that the underwriters were discharged on two grounds; 1st, The ship by putting into Madeira, and staying behind there when the rest of the fleet had sailed, had been guilty of a deviation; 2dly, The captain had wilfully deserted the convoy, and as this was done with the privity of the owner of the goods, who was on board, the policy was vacated.

Park, for the plaintiff, insisted, 1st, That the ship had a right to put into Madeira, and to stop there in the manner she had done, under the liberty given by the policy to touch and stay at all ports and places to land, load, and exchange goods. 2dly, The captain could not be said wilfully to have deserted the convoy; for he was anxious, if possible, to enjoy its protection; and the convoy had rather deserted him.

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Lord ELLENBOROUGH.—I am of opinion that the underwriters are discharged on the ground of deviation. The liberty in the policy must be construed with reference to the main scope of the voyage insured. I am inclined to think this was not a wilful desertion of convoy within the meaning of the act, as the captain appears to have acted *bonâ fide*, and not to have been aware of the precise time when the convoy sailed away from Madeira. However, it is unnecessary to determine that point now; for upon well-established principles the ship was guilty of a deviation by putting into Madeira and voluntarily staying behind there for the purposes of trade, when the rest of the fleet had sailed away in the prosecution of the voyage.

Plaintiff nonsuited.

Park and *Barnewall* for the plaintiff.

Garrow, A. G., and *Nolan*, for the defendant.

[Attornies *Nettleship* and *Pashore*.]

Vide Redman v. London, post.

Thurſday, Dec. 16.

CORLETT *v.* GORDON and another.

Merchants in London receive from a mere ſtranger reſiding abroad a bill of lading of certain goods in a letter requeſting them to effect inſurance. They declining to do buſineſs for the conſignor, but acting bonâ fide with a view to his intereſt, indorſe the bill of lading to a friend of his, who receives the goods, and afterwards fails with the proceeds in his hands.—*Held*, that the merchants by indorſing the bill of lading were liable to the conſignor for the amount.

ACTION on the caſe. The firſt count of the declaration ſtated, that the plaintiff had cauſed to be delivered to the defendants 43 bales of cotton, to be by them ſold and diſpoſed of on account of the plaintiff, and in caſe they could not be ſold and diſpoſed of, to be returned by the defendants to the plaintiff on requeſt; but that the defendants wrongfully and unjuſtly converted the ſame to their own uſe. The ſecond count alleged, that the goods were delivered to the defendants for ſafe cuſtody; and the laſt was in trover. Plea, Not guilty.

The plaintiff being at Parimaribo in South America in the year 1808, incloſed a bill of lading of the cotton in queſtion in a letter addreſſed to the defendants, who are merchants in London, requeſting them to effect inſurance to the full amount. The defendants had not done buſineſs for the plaintiff before, and had not come under any promiſe to act as his conſignees. For ſome reaſons they wiſhed to decline doing ſo; and on receiving the bill of lading they indorſed it over to one *Major*, a friend and creditor of the plaintiff. *Major* effected the inſurance and received the goods, which never came to the poſſeſſion of the defendants. He afterwards became inſolvent with the proceeds in his hands.

Topping for the defendants contended, they were not liable in this action, as the conſignment had been thruſt

thruſt upon them, and they had acted *bonâ fide* for the plaintiff's intereſt. They were not bound to inſure and to ſell the goods. If they did not, was not the indorſement of the bill of lading to *Major* the beſt thing that could be done? If this ſtep had not been taken, the goods might have been loſt on the voyage, without any claim of indemnity from the underwriters; and if they had arrived, they would have been ſeized as forfeited, to pay the duties.

Lord ELLENBOROUGH.—The defendants had no right to indorſe the bill of lading. They could not devolve upon another the authority conferred upon them, and turn over the property to a ſtranger. It is difficult to ſay what they ought to have done; but I am quite clear that they were not juſtified in doing what they did. They had their election either to take or reject the bill of lading. If they took it, they were bound to take it according to the terms of the conſignment, by which they themſelves were to inſure and ſell the goods. They appear to have acted with good conſcience; but they were not correct in point of law.

The plaintiff had a verdict for the value of the goods.

Garrow, A. G., *Park*, and *Marryat*, for the plaintiff.

Topping and *Scarlett* for the defendants.

[Attornies, *Reardon* and *Blunt*.]

Friday, December 17.

BAKER v. DAVIS.

In an action for use and occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial.

THIS was an action for use and occupation to recover £30 for three quarters of a year's rent.

The defendant paid into Court the whole of the rent except a sum equal to the landlord's property tax for the premises in question, which he had paid to the tax-gatherer before the action was commenced.

Burrough for the plaintiff contended, on the authority of Pocock *v.* Eustace, 2 Campb. 181, that the property tax could not be deducted from the rent, in settling the amount of the damages in an action for use and occupation.

Lord ELLENBOROUGH. There the property tax had not been paid by the tenant at the time of the trial; and it is only after payment that the deduction can be claimed. Here, however, the defendant has an undoubted right to the deduction; for he had paid the tax before action brought.

Plaintiff nonsuited.

Burrough and *Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Reynolds* and *Allingham*.]

REMISE.

REUSSE *v.* MEYERS.

Friday, December 17.

THIS was an action of aſſumpſit by the maſter againſt the freighter of a ſhip, for not loading and diſpatching her on a voyage from London to Gottenburgh. The ſhip was denominated in the memorandum for charter "The Swediſh ſhip or veſſel called the Maria."

To prove that a ſhip is Britiſh-built, a Britiſh regiſter ſo deſcribing her is by itſelf no evidence.

A ſhip was deſcribed in a memorandum for charter as "the Swediſh ſhip or veſſel called the Maria." In fact ſhe was Britiſh-built, and had a Britiſh regiſter, but ſhe had a complete ſet of Swediſh papers and a treaſury licence to ſail as a Swediſh ſhip, which particulars were known to the freighter:—*Held*, that in an action againſt him for not loading and diſpatching the ſhip according to the memorandum for charter, he could not ſet up as a defence that ſhe was in point of fact a Britiſh and not a Swediſh ſhip.

The defence was, that the ſhip, inſtead of being *Swediſh*, was *Britiſh* built, whereby the defendant had been prevented from ſending her to Gottenburgh, a Swediſh port.

To prove this, the defendant firſt offered in evidence a Britiſh regiſter of this ſhip, ſtating J. Evans of Yarmouth to be ſole owner. But—

Lord ELLENBOROUGH held, that this was no evidence ſhe was Britiſh-built, without firſt proving that Evans was privy to the regiſter, and then through ſome other medium that he was owner of the ſhip. In the manner in which the regiſter was actually preſented, it was merely *res inter alios acta*, and proved nothing.

Evans himſelf, being in court, was then called, and ſtated that he was ſole owner, and had obtained the regiſter for her as a Britiſh-built ſhip, according to her real character; but that at the time this contract was

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entered into, ſhe had a complete ſet of Swediſh papers, and a treaſury licence to ſail as a Swediſh ſhip, all which particulars were known to the defendant.

Lord ELLENBOROUGH.—I ſhould hold, that the ſhip muſt correſpond with the deſcription in the written contract; but ſhe is Swediſh in one ſenſe, being furniſhed with Swediſh papers, and in a condition to navigate as a Swediſh ſhip. Although the expreſſion in the memorandum for charter be ambiguous, I think it was enough that ſhe had a Swediſh national character impoſed upon her, and that ſhe was Swediſh within the meaning of the parties to the contract.

The plaintiff had a verdict.

Garrow, A. G., and *Abbot*, for the plaintiff.

Park and *Scarlett* for the defendant.

[Attornies, *Bovill* and *Keurſey*.]

See caſe of BENNETT, *Partridge*, 1 Dobſ. Adm. R. 175. and caſe of GUTE HOFFNUNG, *Steffins*, ib. 251.

MERCER

MERCER v. JONES.

Monday, December 20.

In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and intereſt due upon the bill at the time of the converſion.

TROVER for bills of exchange.

The queſtion was, how the damages were to be calculated, the plaintiff contending that he was entitled to intereſt to the time of final judgment, and the defendant that in this form of action the principal only was recoverable.

Lord ELLENBOROUGH. In trover, the rule is, that the plaintiff is entitled to damages equal to the value of the article converted at the time of the converſion. There is no reaſon why this rule ſhould not be applied to trover for bills of exchange. The damages, therefore, in this caſe, muſt be calculated by the amount of the principal and intereſt due upon the bills of exchange at the time of the demand and refuſal to deliver them up.

Verdict accordingly.

Garrow, A. G., and *Marryat* for the plaintiff.

Jervis and *Abbott* for the defendant.

[Attornies, *Tilſon* and *Preſland*.]

Monday, December 20.

DUNCAN v. LOWNDES AND BATEMAN.

In an action on a guarantie for the debt of a third perſon, ſigned by one of two partners in the partnerſhip firm, it is neceſſary to give ſome evidence beyond the relationſhip of partners ſubſiſting between them, that the one who ſigned had authority to bind the other by the guarantie. But for this purpoſe it would be ſufficient to prove a parol acknowledgement from the other partner ſubſequently to the giving of the guarantie, or to ſhew a previous courſe of dealing, in which ſimilar guaranties had been given in the partnerſhip firm, with the privity of both partners.

THIS was an action on a guarantie alleged to have been given by the defendants for the due payment of a bill of exchange to the plaintiff for £670. 15s. accepted by *Dickinſon & Co.*, for the price of goods which the plaintiff had ſold them.

It appeared that the two defendants carried on buſineſs together as merchants at Liverpool, and that this guarantie was ſigned by *Lowndes* in the partnerſhip firm.

Garrow, A. G., for the defendants, inſiſted, that the plaintiff was bound to give ſome direct evidence that *Bateſon* had authorized *Lowndes* to enter into this undertaking.

Scarlett, contra, contended, that this was to be inferred from the relation ſubſiſting between them.

Lord ELLENBOROUGH. As it is not uſual for merchants, in the common courſe of buſineſs, to give collateral engagements of this ſort, I think you muſt prove that *Lowndes* had authority from *Bateſon* to ſign the partnerſhip firm to the guarantie in queſtion. It is not incidental to the general power of a partner to bind his co-partners by ſuch an inſtrument.

Scarlett then propoſed to ſhew that *Bateſon* had ſubſequently approved of the guarantie, which he contended

contended would be evidence of a prior authority to give it.

Garrow, A. G., objected, that this being an undertaking for the debt of another, Bateſon could only be rendered liable by a note in writing.

Lord ELLENBOROUGH. All that the plaintiff has to prove is *Lowndes's* authority to ſign the partnerſhip firm to the guarantie. When that is eſtabliſhed, there is a very good note in writing to bind both partners. For this purpoſe, I think a ſubſequent recognition by *Bateſon* may be given in evidence, as well as a prior command; and either the one or the other may be ſhewn by parol as well as by a written document. Proof of a previous courſe of dealing in which ſuch guaranties were given, and to which both partners were privy, I think, would be ſufficient.

The plaintiff, however, was not prepared with any evidence to affect *Bateſon*, and ſubmitted to be non-ſuited.

Scarlett and *Littledale* for the plaintiff.

Garrow, A. G., and *Park*, for the defendants.

[Attornies, *Atkinſon* and *Cooper*.]

Vide Lord Galloway v. Matthew, 10 East, 264.

Thurſday, December 23.

DOBSON and Others *v.* WILSON.

An action at law may be maintained to recover a contribution in the nature of general average by one ſhipper of goods againſt another.

Where the maſter of a ſhip in a foreign port was arreſted by proceſs out of a court of juſtice, at the ſuit of the agent of the ſhip, for ſums of money the latter had diſburſed on her account, and the maſter not being able to raiſe money by other means, that he might procure his liberation and purſue the voyage, ſold a part of the cargo; *Held*, that the owner of the goods ſo ſold, had no right to a contribution in the nature of general average from the ſhippers of the other goods on board which arrived ſafely at the port of deſtination.

THIS was an action for general average by one ſhipper of goods againſt another. The declaration contained one ſpecial count ſtating the facts of the caſe, a count in indebitatus aſſumpſit for general average, and the uſual money counts. Plea, the general iſſue.

The plaintiffs, in the month of May 1807, ſhipped on board the Rochdale, Captain Garton, four bales of woollen-drapery goods, of the value of £1124, to be carried on a voyage from Hull to St. Peterſburgh. The defendant at the ſame time ſhipped on board the ſame veſſel 322 packages of cotton goods, valued at £16,100, on the ſame deſtination. Some other goods, belonging to different perſons, were likewiſe ſhipped in the Rochdale for this voyage; but they were comparatively of trifling value.

The ſhip ſailed from Hull in the beginning of June; and having met with very tempeſtuous weather, was obliged to put into Stromſtadt, a port in Sweden, to repair. She again ſailed in proſecution of her voyage on the 10th of July. On the 13th of the ſame month ſhe got aground on the Scaw. Aſſiſtance was procured, and at a heavy expence ſhe was got off. However, ſhe was ſo much injured that ſhe was forced to bear away for Copenhagen, where ſhe arrived on the 19th. There the cargo was unloaded; and the ſhip was new ſheathed, and underwent other repairs. For the expence incurred in getting her off the Scaw, the captain gave a bill upon Mr. Parker, merchant

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a merchant at Elſineur, who was the ſhip's agent. This bill Mr. Parker accepted and paid. He alſo, in the ſame capacity, paid the dues for the ſhip paſſing the Sound, and the expence of the repairs done to her at Copenhagen. On the 16th of Auguſt ſhe was ready to proceed on her voyage; but the Engliſh expedition againſt Copenhagen then coming in ſight, ſhe was ſeized by the Daniſh government, and the captain and crew were made priſoners of war. They remained in confinement till the 9th of September, when they were ſet at liberty, and had the ſhip delivered up to them, in conſequence of the ſurrender of Copenhagen to the Britiſh forces. In conſequence of the hoſtilities with Denmark, it became impoſſible to negociate bills upon England for the purpoſe of repaying to Parker the ſums he had diſburſed for the ſhip's uſe; and the captain was quite unable to ſatisfy his demand. Parker thereupon cauſed the captain to be arreſted by proceſs out of the Naval Court of Juſtice at Copenhagen; and that Court decreed that he ſhould pay the debt due to Parker before he could be releaſed. In this ſituation, the captain, for his liberation from impriſonment, and that he might be able to proſecute his voyage, found it would be neceſſary to ſell a part of his cargo; and the four bales of woollen goods belonging to the plaintiffs, being neareſt at hand, were ſelected and ſold for that purpoſe. On the 20th of October he was again ready to purſue his voyage; but a war with Ruſſia being apprehended, he was ordered by Admiral Gambier to return home. The ſhip arrived ſafe at Hull, where the defendant's goods were reſtored to him.

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Topping for the plaintiffs. 1ſt, There can be no doubt that one ſhipper of goods may maintain an action againſt another for a contribution in the nature of general average. He whoſe goods are ſacrificed for the ſafety of the ſhip and the reſt of the cargo, has by law a right to recover a compenſation from thoſe whoſe property is ſaved. Where the law gives a right, it gives a remedy. It is objected, that the contribution to the general average among the ſhippers of goods can only be ſettled in a court of equity. But wherever, as in this caſe, the law upon a valuable conſideration implies a promiſe to pay a ſum of money, an action at law may be ſupported to recover it. A concurrent remedy is ſometimes offered by a ſuit in equity; but the courts of law are never ouſted of their juriſdiction. The difficulty of aſcertaining the exact amount of the contribution, can be no argument againſt the action; for the amount may be proved before a jury as well as before a Maſter in Chancery. Neither is the multiplicity of actions, which may thus be brought, any valid objection to a particular individual recovering by action a ſum of money which is allowed to be due to him. Multiplicity of actions is uſed as a reaſon in particular caſes for refuſing all remedy—as for a public nuiſance which has occaſioned no private damage—but never for driving into a court of equity a party to whom a ſum capable of being liquidated is acknowledged to be due. Theſe arguments would apply with equal ſtrength againſt an action for general average by the owner of the ſhip. But it has been ſolemnly determined, both by the Court of K. B. and the Court of C. P., that ſuch an action may be maintained. Birkley *v.* Preſgrave, 1 Eaſt, 220. Price *v.* Noble, 4 Taunt.

4 Taunt. 123. In the laſt caſe, it is remarkable the contribution was claimed for ſtores thrown overboard, and not for any damage done to the hull or apparel of the ſhip. But is not the ſhip-owner, with regard to the ſtores, in the ſame ſituation as the owner of goods put on board to be carried on freight?——2dly, There can be as little doubt that this is a caſe of general average. The plaintiffs' goods were neceſſarily ſold for the purpoſe of preſerving the ſhip and the reſt of the cargo; and the defendant's goods have thereby been preſerved and reſtored to him. The captain was impriſoned. The ſhip could not depart without him. The ſale of the goods was the only mode of procuring his liberty. Was not the emergency the ſame as if the ſhip herſelf had been ſeized, and a part of the cargo had been ſold to redeem her? She was as effectually prevented from ſailing, by the arreſt of her captain, as if her rudder had been carried away, and detained by the officers of the court of juſtice at Copenhagen, till *Parker* was ſatisfied. The queſtion is, whether the plaintiffs' property was *bonâ fide* ſacrificed for the proſecution of the adventure. It muſt be allowed, that the ſhip could not otherwiſe have ſailed; and the probability is, that the defendant's goods would never have been reſtored to him. Having derived ſo much benefit, ought he not to bear a part of the burthen? Even if any doubt could be entertained with reſpect to ſo much of the money as went to pay the bill of exchange and the repairs at Copenhagen, the Sound dues come within every definition of general average, as for theſe the ſhip and cargo were liable to confiſcation.

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Garrow, A. G., contrà. 1. There is a great difference between an action for general average by the ſhip-owner and by one ſhipper of goods againſt another. The ſhip-owner is accountable in the firſt inſtance to the owner of the goods thrown over board, or neceſſarily ſold. It is therefore his duty to ſettle the whole of the average among all the parties concerned. Having paid for the goods which are ſacrificed, after deducting their proportion of the charge, all the other ſhippers become debtors to him alone. He alone, therefore, has to bring actions for a contribution; and in ſuch actions at his ſuit, the amount of the damages to be recovered may be aſcertained by a very ſimple calculation. But where there are a great variety of ſhippers, if they were allowed to bring actions and croſs actions againſt each other, the moſt inextricable confuſion would enſue. Caſes might eaſily be put to illuſtrate the utter impoſſibility of proving before a jury the amount of the contribution to be paid by one ſhipper of goods to another. Where the average is not ſettled between the ſhip-owner and each particular ſhipper, the reſpective claims and liabilities of the ſhippers among themſelves can only be unravelled and adjuſted in a court of equity. It is a ſtrong argument to ſhew this action cannot be maintained, that this is the firſt inſtance of ſuch an action being brought. In both the caſes cited, the plaintiff was the owner of the ſhip. In the laſt, the contribution was claimed for the ſhip's ſtores that had been thrown overboard; but there is no diſtinction between a jettiſon of ſtores, and of anchors or guns belonging to the ſhip; and that caſe proves no more than the former. 2. At all events, this defendant is not liable to any contribution either

either at law or in equity. The plaintiffs' goods were sold to liberate the perſon of the maſter from impriſonment for a debt which ought to fall excluſively upon the ſhip-owner. Suppoſe the maſter had committed ſome offence at Copenhagen, and had been thrown into priſon for not paying the fine impoſed upon him; would the ſale of a part of the cargo to redeem him from impriſonment have conſtituted a general average? It does not appear that the ſhip might not have ſailed without the maſter, or that another might not have been procured. The plaintiffs are certainly entitled to the value of their goods; but they muſt ſeek their remedy againſt the owner of the ſhip, and not a co-ſhipper, who is as little anſwerable as if the maſter had wantonly deſtroyed them.

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Lord ELLENBOROUGH.—Upon the general queſtion, I am inclined to think that ſuch an action as this may be maintained. A court of equity may, perhaps, be a more convenient forum for adjuſting the claims of the different parties concerned; but if a ſhipper of goods which are ſacrificed for the ſalvation of the reſt of the cargo is entitled to receive a contribution from another ſhipper, whoſe goods are ſaved, I know not how I can ſay that this may not be recovered by an action at law. This is a legal right, and muſt be accompanied with a legal remedy. The difficulty of ſhewing by ſtrict evidence the exact amount of the contribution is great; but as there are data upon which it may be calculated with great certainty, I think this is no objection to the action. The plaintiff by proceeding at law takes that difficulty upon himſelf, and if he is not prepared to overcome it, he cannot

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cannot ſucceed. Nor does the multiplicity of actions which may thus be brought appear a ground on which I can hold that relief muſt be ſought in equity. If there is no valid objection upon principle to a particular action, I know not how I can turn round the plaintiff by ſaying that an inconvenient number of ſimilar actions may be commenced. I cannot perceive why the ſhipper of goods may not maintain an action at law for general average as well as the owner of the ſhip. 2. I muſt ſee, however, that this is a caſe in which general average can be claimed; and I am of opinion that it is not. Is there here any thing like a *jactus mercium levandæ navis gratiâ?* A jettiſon to lighten the ſhip is not the only foundation of general average; but it muſt ariſe from that or ſomething analogous. The diſtinction between general and particular average would otherwiſe be entirely aboliſhed, and the ſhippers of goods would be called upon to contribute to loſſes from which they derive no benefit, and which ought to fall excluſively on the ſhip-owner. Here the agent of the ſhip arreſts the perſon of the maſter, both being agents of the owner, who had undertaken to carry the whole cargo ſafely to its deſtined port. This is different from the arreſt of the captain by a foreign force. Even there I am not aware it has ever been held that the maſter is ſo inſeparably united to the ſhip, that to redeem him it is lawful to ſell a part of the cargo. The proceſs of the court of juſtice at Copenhagen was not directed againſt the ſhip, and was confined entirely to the perſon of the maſter; it was merely an arreſt for a perſonal debt. I was at firſt ſtruck by what was ſaid about the Sound dues; and had the ſhip been ſeized

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for non-payment of theſe, I ſhould have thought the ſale of a part of the cargo to pay them, in the abſence of all other means to raiſe money for that purpoſe, might have been the foundation of a claim for general average. But theſe dues had been paid to the Daniſh government by *Parker*, the ſhip's agent, and the money ſo paid merely conſtituted a private debt due to him, which he ſought to recover by proceſs againſt the perſon of the maſter. It comes to this—whether if the captain be ſevered from the ſhip, whatever be the cauſe, he may ſell a part of the cargo to redeem himſelf? I ſee no diſtinction between this arreſt for debt and an arreſt for an aſſault he might have committed in the ſtreets of Copenhagen. No caſe has been cited, or principle advanced, to ſhew that a claim for general average can ariſe from an act done to redeem the maſter of a ſhip from ſuch an impriſonment. I therefore do not think that any part of the plaintiffs' goods was ſacrificed for the ſafety of the ſhip and the reſidue of the cargo, in ſuch a manner as to give them a right to a contribution from the other ſhippers of goods on board. Their proper remedy is againſt the owner of the ſhip.

Plaintiffs nonſuited.

Topping and *Littledale* for the plaintiff.

Garrow, A. G. and *Park*.

[Attornies, *Hillyard* and *Hall*.]

Vide Abbott on Shipping, Part III. c. 8.

MASTERMAN

Thurſday, December 23.

MASTERMAN and Others *v.* COWRIE.

An agreement that London bankers ſhould accept and pay bills of exchange drawn in the country for a commiſſion of 5s. per cent. being furniſhed with funds to pay the bills before they became due, cannot be uſurious, there being no contemplation of an advance of money.

If upon ſuch an agreement an advance of money were contemplated, it would be a queſtion of fact, whether the commiſſion was a ſhift to obtain more than legal intereſt for the forbearance, or a compenſation for the trouble and expence incurred in accepting and paying the bills of exchange.

THIS was an iſſue directed by the Lord Chancellor, to try whether at the time of the ſuing forth of a commiſſion of bankrupt, bearing date the 2d of November 1812, againſt *John Hughes Goodlake* and *William Hartley Goodlake*, they were indebted in any and what ſum of money to the plaintiffs.

The plaintiffs are bankers in London. In October 1811, *David Bromer*, a merchant in London, who did not keep caſh with them, applied to them to accept bills for him at ſhort dates, for which he was to provide before they became due. Accordingly, it was agreed that ſuch bills ſhould be drawn by ſome perſon procured by him; that the plaintiffs ſhould accept them; that *Bromer* ſhould always provide for them before they became due; that by way of ſecurity he ſhould depoſit with the plaintiffs good bills, at long dates, to a larger amount; and that the plaintiffs ſhould receive a commiſſion of five ſhillings per cent. upon the bills accepted and paid by them for their trouble. After the parties had dealt together ſome time on the footing of this agreement, the plaintiffs expreſſed themſelves diſſatisfied with the manner in which the bills were drawn, and requeſted that they ſhould be drawn for the future by ſome reſpectable perſon in the country. *Bromer* ſaid, if the plaintiffs could procure any ſuch perſon, he would allow him one ſhilling per cent. for his trouble in drawing the bills. *William Maude*, a banker at Otley in Yorkſhire,

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Yorkſhire, was then mentioned, and he conſenting to the arrangement, it was agreed, that in future the bills ſhould be drawn in his name. In this way the plaintiffs continued to accept and pay bills, at two months, drawn upon them by *William Maude*, till *Bromer* became bankrupt in September 1812, charging the 5*s.* per cent. commiſſion for themſelves, and the 1*s.* for the drawer, which was regularly paid him. During the whole of that time they never were in advance to *Bromer*. Afterwards, they were obliged to take up bills they had accepted for him, for which he had not provided funds. He had lodged with them, by way of ſecurity, bills to the amount of £19,296. 1*s.* 9*d.* accepted by *J. H. Goodlake* and *W. H. Goodlake*. Theſe perſons ſoon afterwards themſelves became bankrupt, and the preſent queſtion aroſe upon the plaintiffs ſeeking to prove the bills under their commiſſion. One of the plaintiffs having been examined before the commiſſioners, and having declared that intereſt never had been charged to *Bromer*, was aſked, whether, if *Bromer* had not become bankrupt, intereſt would not have been charged by them upon any caſh they advanced to take up their acceptances?—to which he anſwered, there was no agreement for that purpoſe; but he ſuppoſed they would have charged legal intereſt.

Garrow, A. G., for the plaintiffs, ſtated the queſtion to be, whether the tranſactions between them and *Bromer* were tainted with uſury? and contended there could be no uſury in the caſe, as there was no advance of money. The 5*s.* per cent. could not be referred to forbearance, there being no debt to be forborne,

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and was merely a compenſation for their trouble in accepting and paying the bills. The compenſation was extremely moderate; but were it ever ſo extravagant, it could no more be made uſury than any other payment for work and labour done and performed.

Park, *contrà*, inſiſted, that this was ſubſtantially an agreement for the loan of money, and that if the agreement was uſurious, no valid debt could ariſe out of it. The plaintiffs could not have maintained an action againſt *Bromer* for the money they paid in taking up their acceptances, and therefore could have no claim againſt *Goodlake and Co.* upon the bills lodged in their hands as a ſecurity for an uſurious debt. He relied upon Kent v. Lowen, 1 Campb. 177. in which it was held, that a perſon accommodating another by accepting a bill of exchange, cannot, like a country banker diſcounting a bill, take any thing beyond five per cent. intereſt, by way of commiſſion, without committing uſury.

Lord ELLENBOROUGH.—The iſſue ſent by the Chancellor is to try whether the debt of *Goodlakes* to the plaintiffs is conſtituted in uſury. If it be ſo, it is no debt at all. The uſury is ſuppoſed to be committed in the dealings with *Bromer*. The agreement between them was this: they, in conſideration of a quarter per cent. were to accept and pay for him bills drawn by *William Maude* at Otley in Yorkſhire; before they became due, he was to provide funds to take them up; he was likewiſe to lodge other bills at longer dates in their hands by way of ſecurity; and he was to allow a ſhilling per cent. to the drawer of the

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the bills. Here no advance of money is anticipated. It might have happened, by the cash not being provided, or the securities proving unproductive, that an advance might possibly have taken place; but it does not appear to have been in the contemplation of the parties. The first question is, whether there was a contract for a loan? If there was, there may be usury to vitiate the debt, or to cut down the securities, although no advance took place till after *Bromer*'s bankruptcy upon which no interest was charged. There must be an actual loan and a receipt of usurious interest to render a party liable to penalties; but if there be a stipulation for more than five per cent. upon a contemplated advance, the agreement is usurious, and no transactions under it can be the foundation of a valid debt. Here, however, nothing appears to have been anticipated to be done by the plaintiffs beyond the acceptance and payment of the bills. They never were in advance to *Bromer* till after his bankruptcy, and there seems no reason to suppose that a loan of money was ever in their thoughts. If so, the commission of 5*s*. per cent. could not be for forbearance, and could not be the foundation of usury. The only question arising out of the 1*s*. allowed to the drawer is, whether that was a colour for usury. If it was *bonâ fide* applied to *Maude*'s use, it cannot be usurious, and it may be entirely removed from the consideration of the case. Then may not the 5*s*. be accounted for on the score of the trouble which the plaintiffs had in accepting and paying the bills, in receiving the funds for that purpose, and in taking care of the securities deposited with them? It has been decided that *country bankers* may charge a commission beyond the £5. per

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cent. for the money advanced. Inſtead of the expreſſion, country bankers, I prefer a deſcription of the thing done. Before all mercantile tranſactions were carried on by means of a paper circulation, country bankers were at a great charge in procuring caſh. It was a ſort of foreign commodity which they had to import; therefore, in conveying and inſuring it, they incurred a great collateral expence. If under theſe circumſtances they were allowed only 5 per cent. on the whole tranſaction, they might have received only $4\frac{1}{2}$ for the forbearance of the money advanced. A ſimilar expence may be incurred every where, by keeping clerks and a counting-houſe on purpoſe to accept and pay bills with funds provided by the perſon for whom the buſineſs is done. In all theſe caſes it is neceſſary to detach the trouble of keeping accounts, from intereſt for the forbearance of money. I remember an iſſue being tried at Cheſter, whether 5*s.* per cent. was a fair commiſſion upon the diſcount of bills there; and it was found to be ſo. I agree with what the Chancellor is ſtated to have ſaid in directing the preſent iſſue, that unleſs there be an eventual advance of money contemplated, there can be no uſury. Here the advance of money was not the ſubſtance of the contract. It was never mentioned among the parties, and never happened till the cloſe of the tranſactions, when no intereſt was charged upon it. Had an advance been made, I ſhould have left it to the jury whether the commiſſion was a ſhift for obtaining more than legal intereſt for the forbearance of the money. But if an advance was neither made nor contemplated, the commiſſion can be conſidered only a compenſation for ſervices performed.

Verdict,

Verdict, that *J. H. Goodlake* and *W. H. Goodlake* were indebted to the plaintiffs in the ſum claimed.

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Garrow A. G., *Topping*, *Marryatt*, and *Irvine*, for the plaintiffs.

Park and *Puller* for the defendant.

[Attornies, *Sudlow* and *Devon*.]

Vide Barclay q. t. *v.* Walmſley, 4 Eaſt. 55.

DENTON and Others *v.* RODIE and Another.

Thurſday, Dec. 23.

THIS was an iſſue to try whether *James Henry Clough*, *Joſhua Smithſon Wilkes* and *James Butler Clough* were, at the date and ſuing forth of a commiſſion of bankrupt againſt them, indebted to the plaintiffs in any and what ſum of money.

Where one of ſeveral partners, with the privity of the others, draws bills of exchange in his own name upon the partnerſhip firm, in favour of perſons who advance him the amount, which he applies to the uſe of the partnerſhip, altho' the partners are not jointly liable on the bills, they may be jointly ſued by the payees for money lent.

The bankrupts entered into partnerſhip together as general merchants at Liverpool, in 1806, under the firm of *Clough, Wilkes, and Clough*. Soon after, in purſuance of a previous arrangement, *James Butler Clough* went out and eſtabliſhed himſelf at New York, in the United States of America, with a view to form connexions, and to procure conſignments for the benefit of the houſe at Liverpool. While there he did no buſineſs on his private account. For the purpoſe of

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raiſing money, he was in the habit of drawing bills in his own name upon the houſe, in the following form:

New York,
No. 218. Exch. £1,500 Sterl. 17th Aug. 1810.

Sixty days after ſight of this ſecond of exchange (firſt, third and fourth unpaid) pay to Meſſrs. Denton, Little, and Co. or order £1,500. ſterling in London, value received, and place the ſame to account of ſundries, as adviſed by, J. B. Clough.

To Meſſrs. Clough, Wilkes and Clough, Liverpool.

Theſe bills he ſold at New York for caſh or promiſſory notes at ſhort dates, according to the current rate of exchange. The money thus raiſed, he applied entirely in the purchaſe of homeward inveſtments for the houſe at Liverpool, or in defraying his perſonal expences, for which, it was underſtood, he was to have had £400. a year, but for which no regular allowance was made him. He had often no other funds for theſe purpoſes. He periodically remitted home an account of the manner in which he thus raiſed and applied the money, which was never complained of. The houſe at Liverpool regularly accepted and paid the bills ſo drawn, till it ſtopped payment in November 1810. *J. B. Clough* afterwards returned to England, and a joint commiſſion of bankrupt was ſued out againſt the three partners on 5th December 1811.

The plaintiffs are Britiſh ſubjects, who carried on trade at New York, under the firm of *Denton, Little, and Co.* They became holders of the bill of exchange above ſet out,

out, and, ſubſequently, of ſeveral others of the ſame import, by advancing money upon them to *J. B. Clough*, according to the rate of exchange. The firſt was accepted by the houſe, but not paid, and the houſe had ſtopped payment before the others were preſented for acceptance. Theſe bills the plaintiffs wiſhed to prove upon the joint eſtate of the three bankrupts. The joint creditors inſiſted that they could only be proved upon the ſeparate eſtate of the drawer. To determine that queſtion, the preſent iſſue was directed by the Lord Chancellor.

Garrow, A. G., for the Plaintiffs, contended that the bills were to be conſidered as drawn by the houſe, although in the name of one partner; and that at any rate the partners were all jointly indebted, as the money advanced upon the bills had been raiſed for their joint uſe, and applied for their joint benefit.

Topping, contra, relied upon Emly v. Lye, 15 Eaſt. 7. as an authority expreſsly in point. There one of two partners drew bills of exchange in his own name, which he procured to be diſcounted with a banker, through the medium of the ſame agent who procured the diſcount of other bills drawn in the partnerſhip firm with the ſame banker; and it was held that the latter had no remedy againſt the partnerſhip, either upon the bills ſo drawn by the ſingle partner, or for money had and received through the medium of ſuch bills; the money being advanced ſolely on the ſecurity of the parties whoſe names were on the bills *by way of diſcount*, and not by way of *loan* to the partnerſhip;

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though the banker conceived, at the time, that all the bills were drawn upon the partnerſhip account.

Lord ELLENBOROUGH.—I think this caſe is diſtinguiſhable from Emly v. Lye. Here I conceive the partner in America had authority from the two others to raiſe money for the uſe of the firm; and money was accordingly raiſed from the plaintiffs upon theſe bills, in purſuance of ſuch authority. The tranſaction is a loan rather than a diſcount. *J. B. Clough* was ſent out to America to manage the buſineſs of the houſe there, and to procure homeward inveſtments. The ſhipments from this country did not form an adequate fund for that purpoſe. He ſays himſelf that he had a *carte blanche* as to the means he ſhould adopt. He accordingly raiſes money, for which he gives as a ſecurity bills of exchange, drawn in his own name, upon the houſe. They know and recognize this mode of dealing. They regularly accept and pay the bills ſo drawn till the time of their failure. Therefore, although I cannot ſay they are jointly liable upon the unaccepted bills, I think they are jointly indebted to the ſame amount, as for money lent, or money had and received.

It was then ſuggeſted that the plaintiffs, upon this ſuppoſition, could not claim intereſt; but Lord Ellenborough thought, that from the courſe of dealing, the plaintiffs ware entitled to intereſt, although they did not recover upon the written ſecurities.

Verdict accordingly.

Garrow,

Garrow, A. G., *Park*, and *Littledale*, for the plaintiffs.

Topping, *Scarlett*, and *Richardſon*, for the defendants.

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[Attornies, *Cooper* and *Lowes*.]

Vide Siffkin v. Walker, 2 Campb. 308.

CARSTAIRS and Others, Executors of LYON, v. ALLNUTT.

Thurſday, Dec. 23.

THIS was an action on a policy of inſurance on the ſhip *Simon Clarke*, at and from her port or ports of loading in Jamaica to Leith.

To vacate a policy of inſurance for an infraction of the convoy act, it is not enough to ſhew that the ſhip ſailed without convoy by the inſtrumentality of an agent of the aſſured, unleſs it appear that the agent had authority from his principal for this purpoſe.

The defence was, that the ſhip had been guilty of a breach of the convoy act, by the inſtrumentality of the agent of *Sibbald*, the owner, in whom the intereſt was averred.

Sibbald reſides at Leith. In February 1812, the policy was effected in London by *Lyon* his agent, who ſtated to the underwriters, "he was uncertain whether the ſhip would ſail home with convoy or not; he thought ſhe very likely would ſail with the May convoy; if not, ſhe would run it in company with another ſhip of *Sibbald*'s, called the Lady Forbes; that he therefore wiſhed, inſtead of the common premium of

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of eight guineas, to return four for convoy, a medium premium of ſix guineas ſhould be fixed without any returns." The policy was accordingly effected upon theſe terms.

The ſhip ſailed from Jamaica on the 1ſt of Auguſt, without convoy, and was captured on her voyage home. *Sibbald*'s ſon was on board; but it did not appear in what capacity.

Garrow, A. G., for the defendant, contended that theſe facts afforded ſufficient evidence of the aſſured having "directed or been in ſome way privy to or inſtrumental in cauſing the ſhip to ſail without convoy."

Lord ELLENBOROUGH. I think there is no evidence here to connect the owner with the breach of the convoy act. That is a very penal ſtatute, and is to be conſtrued ſtrictly. It is not enough that an agent of the aſſured is privy to or inſtrumental in cauſing the ſhip to ſail without convoy. To vitiate the policy there muſt be the perſonal privity of the aſſured, and the *inſtrumentality* muſt be by his own act. Where the conduct of the agent of the aſſured is ſet up as an infraction of the convoy act, it muſt be ſhewn that he had authority from his principal for that very purpoſe. Therefore *Sibbald* in this caſe cannot be affected by the act of the captain in ſailing without convoy; nor would it be material if (which does not appear) his ſon had been ſupercargo, and had directed this to be done. Then it comes to the repreſentation of the broker to the underwriters. He ſeems rather to have expected that the ſhip would ſail with convoy; and

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and at any rate what he ſaid does not prove that his principal had given directions to the contrary.

Verdict for the plaintiff.

Park and *Scarlett* for the plaintiffs.

Garrow and *Richardſon* for the defendant.

[Attornies, *Shepherd* and *Dann*.]

Vide Cohen v. Hinckley, 1 Taunt. 249. 2 Campb. 51. Wainhouſe v. Cowie, 4 Taunt. 178.

HENRY *v.* LEIGH.

Thurſday, Dec. 24.

THIS was an action againſt the defendant as drawer of a bill of exchange for £2000. dated the 20th of October 1810, payable 15 months after date to the defendant's order, and by him indorſed to the plaintiff.

To prove the allowance of a bankrupt's certificate by the Lord Chancellor, the book kept in the office of the ſecretary of bankrupts, in which entries are made of the allowance of certificates, is not ſecondary evidence.

Pleas, 1ſt. The general iſſue; 2dly, bankruptcy. Replication to the laſt plea, that the defendant had been before diſcharged by virtue of 5 Geo. 2. c. 30. and that he had not paid 15*s.* in the pound under the ſecond commiſſion awarded againſt him (*a*). Rejoinder, that

To prove that the defendant who pleads his bankruptcy had been before diſcharged as a bankrupt,—after notice to produce the former certificate, it is enough if witneſſes ſtate they were employed by him to ſolicit that certificate, and that looking at the entries in their books they have no doubt it was allowed by the Lord Chancellor.

(*a*) In Wilſon v. Kemp, E. T. 1814, the court of K. B. decided that ſuch a replication to a plea of bankruptcy is bad on ſpecial demurrer.

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the defendant had not been before diſcharged; and iſſue thereupon.

The formal evidence on the bill being given, the plaintiff proved a notice upon the defendant to produce his certificate under the firſt commiſſion, which was not produced. The defendant's affidavit of conformity under that commiſſion procured from the office of the Secretary of Bankrupts was then put in. To prove that the certificate had been allowed by the Lord Chancellor, Mr. Church, a clerk from the ſame office, was then called. He produced a book kept in the office, containing an account of the allowance of bankrupts' certificates. In this there was an entry in the hand-writing of one *Charnock*, another clerk in the office, not called as a witneſs, which ſtated that the defendant's certificate was allowed by the Lord Chancellor on the 2d of October 1803. The mode in which theſe entries are made was deſcribed to be as follows: When ſeveral affidavits of conformity have been filed in the office of the Secretary of Bankrupts, a clerk from the office carries them together with the certificates to the Lord Chancellor, who ſigns the certificates in the preſence of the clerk. The latter then writes "*all.*" for "allowed" on the back of the affidavits. As ſoon as he has returned to the office, he makes entries of theſe allowances in the book kept for that purpoſe. This book is the only regiſter kept of certificates being allowed. It is conſulted by the public who wiſh for information reſpecting the allowance of bankrupts' certificates; but it is never ſeen or referred to by the Lord Chancellor. Neither the Secretary of Bankrupts nor his clerks are ſworn officers.

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Garrow, A. G., for the plaintiff, contended, that this was good ſecondary evidence of the allowance of the certificate. The book muſt be conſidered an official document. The moſt ſerious conſequences muſt follow to bankrupts themſelves if it were rejected; for in caſe of their certificates being loſt, this is the only evidence to protect them from their creditors. The entries were made in the courſe of office, and were to be admitted like the rules of the courts of common law, without calling the clerk who wrote them.

Topping, *contrà*, maintained, that in the abſence of *Charnock* this entry was not evidence. While he was alive it was not the beſt ſecondary evidence that could be adduced; for if the certificate ever was allowed, according to the courſe of proceeding deſcribed, it muſt have been allowed in his preſence. Why then was he not called to ſtate the fact? The entry might be a forgery, and from ſome motive or other might be written by him although the certificate never exiſted.

Lord ELLENBOROUGH.—Had this book been kept by order of the Lord Chancellor; had it from time to time been laid before him; had he referred to it and acted upon it, I ſhould have held it admiſſible evidence to prove the allowance of the certificate, without calling the clerk by whom the entry was made. But from the account now given of the book by the witneſs, I am inclined to think it is not receivable. I can hardly attach to it the authenticity of an official document. It appears rather to be the private memorandum of the clerks, kept for the information of thoſe who conſult them.

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them. The entries are not made by one perſon in the courſe of his official duty, but by any of the clerks in the office; and none of them are ſworn officers of the court.

The ſolicitor to the commiſſion, who reſides at Liverpool, and his agent in town, were afterwards called by the plaintiff. They ſtated, that they had been employed by the defendant to ſolicit his certificate under the firſt commiſſion, and that looking at the entries they had made in their books of charges, they had no doubt the certificate was allowed by the Lord Chancellor.

Topping ſtill inſiſted that this was not ſufficient ſecondary evidence; particularly as it had never been proved that the certificate had come to the poſſeſſion of the defendant.

Lord ELLENBOROUGH.—If the certificate was obtained for the defendant, I will preſume that it came to his poſſeſſion; and as he does not produce it upon notice, I think there is now abundant ſecondary evidence that the certificate was allowed. The iſſue joined is, that the defendant was not diſcharged under the ſtatute before he became bankrupt as ſtated in his plea. He was ſo diſcharged if he obtained his certificate under a former commiſſion. We have now legal evidence of the certificate being obtained. Therefore, as well on that iſſue as on the plea of non aſſumpſit, there muſt be a

Verdict for the plaintiff.

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Garrow, A. G., *Scarlett*, and *Campbell*, for the plaintiff.

Topping, *Holroyd*, and *Littledale*, for the defendant.

[Attornies, *Hutchiſon* and *Cooper*.]

Note.—Neither the firſt commiſſion nor any of the other proceedings under it were produced.

COURT OF COMMON PLEAS.

ADJOURNED SITTINGS AFTER TERM AT GUILDHALL.

REDMAN *v.* LONDON.

Tueſday, December 21.

A policy of inſurance "at and from London to Berbice" was effected upon the receipt of a letter from the captain, (which was ſhewn to the underwriters,) ſtating that he had paſſed Barbadoes, and the words "at ſea" were inſerted in the policy after the printed clauſe deſcribing the beginning of the adventure on the goods. Held, notwithſtanding, that the policy was vacated by a deviation at Madeira, in a former part of the voyage.

THIS was an action on a policy of inſurance, dated 8th January 1813, on the ſhip *Sir Sidney Smith*, at and from London to Berbice.

After the printed words in the policy, "beginning "the adventure upon the ſaid goods and merchan- "dizes, from the loading thereof aboard the ſaid "ſhip," there were inſerted, in writing, the words "*at ſea.*"

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The only extraordinary liberty given by the policy, was, "to join and ſail with convoy, without being "deemed a deviation."

This policy was on the ſame ſhip and the ſame voyage mentioned in *Williams* v. *Shee*, ante, 469. and exactly the ſame evidence was now given reſpecting the tranſactions at Madeira and the ſubſequent loſs as upon the trial of that cauſe before Lord Ellenborough. The broker, however, ſwore, that when he effected the policy he ſhewed the underwriters a letter, written by the captain at ſea, when he was between Barbadoes and Berbice, ſtating that he had parted company with the convoy.

Beſt, Serjt., for the defendant, read the foregoing note of *Williams* v. *Shee*, and inſiſted that the preſent caſe was much ſtronger in favour of the underwriters, as the policy here did not contain the liberty to land, load, and exchange goods, which was there relied upon.

Shepherd, Serjt. for the plaintiff, allowed, that the ſhip had been guilty of a deviation at Madeira; but contended, that the underwriters on this policy could not take advantage of it. This policy was only meant to take the ſhip up "at ſea" from the date of the laſt letter from the captain, and to protect her during the remainder of the voyage to Berbice. For this purpoſe, the words "at ſea" were introduced into the policy. Their meaning might be a little equivocal on the face of the inſtrument, but became quite apparent when coupled with the letter ſhewn to the underwriters;

derwriters; therefore a deviation prior to that letter was equally immaterial as a deviation upon any former voyage.

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Beſt, Serjt. in reply.—It is impoſſible to make "at ſea" one of the *termini* of the adventure. The policy is "at and from London to Berbice," and the declaration accordingly avers, that the ſhip was in good ſafety at *London*, and ſailed from thence on the voyage in the policy of inſurance mentioned. Had the ſhip ſuſtained any ſecret damage at Madeira, the underwriters would unqueſtionably have been liable for an average loſs. The date of a policy is wholly immaterial, if it be effected before the event is known to either party. The invariable rule is, that it attaches at the place where the riſk is deſcribed to commence, and if not diſcharged by a deviation, protects the ſhip during the whole of the adventure. The captain's letter cannot be made a part of this policy, which does not refer to it, and the words "at ſea," connected as they are with the loading of goods and merchandizes, are wholly nonſenſical.

MANSFIELD, C. J.—Whatever the intention of the parties might be, I ſee nothing in this policy to ſhew that it was not to attach at London. I muſt therefore hold, that the underwriters were diſcharged by the deviation at Madeira.

The plaintiff was nonſuited, and the nonſuit was afterwards confirmed by the Court of Common Pleas.

Shepherd, Serjt. and *Marryat* for the plaintiff.

Beſt, *Vaughan*, Serjts., and *Campbell* for the defendant.

[Attornies, *Rivington* and *Blunt*.]

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But although a policy of insurance in general applies to the whole of the voyage specified in the policy, even where a part of it is performed before the policy is effected, yet it has been held, that if the assured have previously received a letter from the captain, in which he omits to mention an accident that had befallen the ship in the prior part of the voyage, the underwriters are not liable for the damage thereby sustained. Gladstone *v.* King, 1 Maule & Selw. 35.

Wednesday, December 22.

SCHNEIDER and another *v.* HEATH.

Although a ship be sold, "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale.

THIS was an action for money had and received, to recover back the deposit paid upon the purchase of a ship called the Juno, on the ground of misrepresentation and fraud on the part of the vendor.

The sale took place at Lloyd's Coffee-house on the 23d of July last, when a particular was exhibited by the defendant, describing the ship in the following terms:

"British-built at Monkwearmouth in 1810, for "private use; 129 tons per register; is a clever, "burthensome, useful vessel for general purposes; "unusually well found in stores, among which are a "new cable and hawser never wetted, and a large "proportion of entirely new sails: *the hull is also* "*nearly as good as when launched*; requiring a most "trifling outfit. Now lying off No. 3. Warehouse, "London Docks. Hull, masts, yards, standing and "running rigging, *with all faults as they now lie.*"

After

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After this deſcription of the ſhip followed an inventory of the anchors, cables, ſails and ſhip's ſtores, proviſions and boats, and at the end of this inventory was the following declaration:

"The veſſel and her ſtores *to be taken with all* "*faults*, as they now lie, without any allowance for "weight, length, quality, or any defect whatever."

The veſſel was purchaſed by the plaintiff for £1580. and he immediately paid the depoſit of £397. 2*s*. which he now ſought to recover.

Having taken poſſeſſion of her, he ſent her to a ſhipwright's to be examined. Here it was found that her bottom was worm eaten, that her keel was broken, that ſhe was quite unſeaworthy, and that ſhe by no means correſponded with the deſcription in the particular. The plaintiff thereupon refuſed to complete the purchaſe, and demanded back his depoſit.

It now appeared in evidence, that the ſhip belonged to a club of underwriters, to whom ſhe had been abandoned, and on whoſe account ſhe was ſold; that the ſtate of her bottom and her keel muſt have been known to the agents employed to conduct the ſale; and that the captain, when the ſhip was advertiſed for ſale, took her from the ways on which ſhe lay, and where the ſtate of her bottom and her keel might eaſily have been diſcovered, and kept her conſtantly afloat, ſo that theſe defects were completely concealed by the water. The perſon who had framed the par-

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ticular ſtated, that he had inſerted the deſcription of the veſſel without having examined her.

Shepherd, Serjt., for the defendant, contended, that the action could not be maintained, as the ſhip and her ſtores, according to the particular, were to be *taken with all faults*. Theſe words put the purchaſer on his guard, and threw upon him the riſk of all faults, latent and apparent, known and unknown. It was the duty of the plaintiff to have examined the ſhip's bottom and the ſtate of her keel before the ſale. The vendors had introduced words to obviate all ſubſequent diſputes, and the plaintiff could not now come and complain of his own negligence.

MANSFIELD, C. J.—The words are very large to exclude the buyer from calling upon the ſeller for any defect in the thing ſold; but if the ſeller was guilty of any poſitive fraud in the ſale, theſe words will not protect him. There might be ſuch fraud, either in a falſe repreſentation, or in uſing means to conceal ſome defect. I think the particular is evidence here by way of repreſentation; that ſtates the hull to be nearly as good as when launched, and that the veſſel required a moſt trifling outfit. Now, is this true or falſe? If falſe, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ſhip could not be rendered ſeaworthy without a moſt expenſive outfit. The agent tells us, he framed this particular without knowing any thing of the matter. But it ſignifies nothing, whether a man repreſents a thing to be different from what he knows it to be, or whether

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ther he makes a repreſentation which he does not know at the time to be true or falſe, if in point of fact it turns out to be falſe. — But beſides this, it appears here that means were taken fraudulently to conceal the defects in the ſhip's bottom. Theſe muſt have been known to the captain, who is to be conſidered the agent of the owners; and he, evidently to prevent their being diſcovered by perſons diſpoſed to bid for her, removed her from the ways, where ſhe lay dry, and kept her afloat in the dock till the ſale was over. Therefore, conſiſtently with the decided caſes upon this ſubject, I am of opinion that the plaintiff is entitled to recover back his depoſit.

Verdict accordingly.

Beſt, *Vaughan*, Serjts. and *Scarlett* for the plaintiff.

Shepherd, Serjt. and *Taddy* for the defendant.

[Attornies, *Dawes* and *Palmer & Co.*]

Vide Melliſh v. Motteux, Peak. Caſ. 115. Baglehole v. Walters, 3 Camp. 154.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Hilary Term,

54 GEORGE III.

Thurſday, Feb. 17.

KEMP *v.* DERRETT.

Where premiſes are taken under an agreement by which the "tenant is always to be ſubject to quit at three months' notice," this conſtitutes a quarterly tenancy, which may be determined by a three months notice to quit, expiring at the ſame time of the year it commenced, or any correſponding quarter day.

But although the tenant under ſuch an agreement enters in the middle of one of the uſual quarters, if there appears to be no agreement to the contrary, he will be preſumed to hold from the day he enters; and the tenancy can only be determined by a notice expiring that day of the year, or ſome other quarter day calculated from thence.

THIS was an action of debt to recover double the yearly value of a part of the *Angel Inn* at Iſlington, which the defendant was alledged to have unlawfully held over after the determination of a notice to quit.

The defendant became tenant of the premiſes to the plaintiff on the 29th of October 1810. The agreement between them was, "that the defendant was always "to be ſubject to quit at three months notice." The defendant had a three months notice to quit at laſt Chriſtmas, or to pay double value, but has nevertheleſs continued in poſſeſſion.

Park contended, on the authority of *Doe d. Pitcher* v. *Donovan*, 1 *Taunt.* 555, 2 *Campb.* 78, that the three months notice to quit muſt expire at the ſeaſon of the

year

year when the tenancy commenced; and that at any rate it must expire on the 29th October, or some other quarter day corresponding with that date.

Garrow, A. G., said, the tenancy in *Doe* v. *Donovan* was from year to year, whereas in this case it must be taken to be from three months to three months; and that though the defendant entered on the 29th of October, he must be considered to have held from the preceding or succeeding quarter day on which rents are usually paid.

Lord ELLENBOROUGH.—This does appear to me to be a holding from three months to three months: Therefore a notice to quit, expiring at the end of any quarter from the time of his entry, would have been sufficient to determine the tenancy.—I am quite clear, however, that the notice should have expired on the 29th January, 29th April, 29th July, or 29th October. The defendant might have been made to hold from the preceding or succeeding general quarter day; but in the absence of all evidence to the contrary, I must presume, that he held from the time when he entered as tenant.

Garrow and *Espinasse* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies, *Evans* and *Cocker*.]

Thurſday, Feb. 17.

FENN d. PHILLIPS *v.* COOKE and Another.

In ejectment, where the defendant comes in as landlord, it is neceſſary to ſhew that he is in the receipt of the rents and profits of the premiſes to which the leſſor of the plaintiff makes title, or that the declaration in ejectment was ſerved upon the tenant in poſſeſſion of theſe premiſes.

EJECTMENT for a houſe a Brompton, wihch had been demiſed by *Phillips* from year to year to one *Flinn*, and when the ejectment was brought was in the poſſeſſion of another perſon of the name of *Hodgson*. The defendants came in as landlords. It was ſtated that *Flinn* had become bankrupt, and that the defendants were his aſſignees; but there was no proof of this; nor could any evidence be adduced to connect the defendants either with *Flinn* or with *Hodgson*. — The leſſor of the plaintiff reſted his caſe on proving the tenancy of *Flinn*, and a notice to quit ſerved upon him and upon *Hodgson*, without ſhewing the ſervice of the ejectment.

The objection being taken, that there was no evidence that the defendants were landlords of the premiſes to which the leſſor of the plaintiff had made title,—

It was contended, that the defendants were eſtopped from taking this objection, by coming in to defend as landlords. But—

Lord ELLENBOROUGH ſaid, there was nothing to connect them with the premiſes demiſed to *Flinn*. It did not appear that theſe were the premiſes of which they claimed to be landlords. No evidence had been given that theſe were the premiſes for which the ejectment was brought, and which the defendants claimed

as landlords. The leſſor of the plaintiff ſhould either have proved that they were *Flinn*'s aſſignees, or that the ejectment had been ſerved upon *Hodgson*, the tenant in poſſeſſion.

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FENN d. PHILLIPS v. COOKE and Another.

Plaintiff non-ſuited.

Walton for the leſſor of the plaintiff.

Jervis and *J. Parke* for the defendants.

[Attornies, *Tomlinſon* and *Vizard*]

Vide Doe d. Schoſield v. Alexander, poſt. 516.

SMITH v. RALEIGH.

Friday, Feb. 18.

ASSUMPSIT for the uſe and occupation of a houſe and garden. Plea, the general iſſue.

Where premiſes are let at an entire rent, an eviction from part, if the tenant thereupon gives up poſſeſſion of the reſidue, is a complete defence to an action for uſe and occupation.

It appeared, that after the defendant had agreed to take the premiſes at an entire rent, and poſſeſſion had been delivered to him, the plaintiff railed off a part of the garden, and built a privy upon it, for the uſe of a number of his other tenants. The defendant thereupon returned the keys to him.

Lord ELLENBOROUGH ruled, that this amounted to an eviction from part of the demiſed premiſes; which, the

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the taking being ſingle, and the rent entire, he conſidered a complete anſwer to the action.

Plaintiff non-ſuited.

Topping and *Puller* for the plaintiff.

Garrow, A. G., for the defendant.

[Attornies, *Vincent* and *England*.]

This caſe was recognized by DALLAS J., in *Stokes* v. *Cooper*, *Worceſter Lent Aſſizes*, 1814, in which the rule was laid down, that after eviction from part, the landlord cannot recover upon the original contract, and the tenant, by giving up poſſeſſion of the reſidue, is entirely diſcharged; but that if the tenant, after the eviction, continues in poſſeſſion of the reſidue, he may be liable upon a quantum meruit. *Vide* Dalſton v. Reeve, Ld. Raym. 77. Clun's Caſe, 10 Rep. 128.

Friday, Feb. 18.

LAWRENCE, Widow, *v.* OBEE.

If an antient window has been completely ſhut up with brick and mortar above twenty years, it loſes its privilege.

An Action for a nuiſance to a houſe cannot be maintained for that which was no nuiſance to the houſe before a new window was opened in it by the plaintiff, and which becomes a nuiſance only by that act.

THIS was an action on the caſe, for erecting a privy in the defendant's houſe, which was a nuiſance to the adjoining houſe of the plaintiff.

It appeared that this privy, when firſt erected, was no nuiſance whatever to the plaintiff; but ſhe afterwards ſtruck out a window in the wall of her houſe immediately over it; and that unpleaſant ſmells were then introduced into the houſe through this window from the privy. There was the mark of an old window in the place where this window was ſtruck out; but

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but it had been filled up with brick and mortar above twenty years before the privy was erected.

Lord ELLENBOROUGH held, that from the window having been ſhut up for twenty years, the caſe ſtood as if had never exiſted; and that the plaintiff having brought the nuiſance upon herſelf, by opening the window, had no right of action.

Plaintiff non-ſuited.

Topping, *Eſpinaſſe*, and *W. E. Taunton*, for the plaintiff.

Parke, *Lawes*, and *Courthope*, for the defendant.

[Attornies, *Martindale* and *Jones*.]

CUTHBERT *v.* GOSTLING.

Friday, Feb. 18.

TRESPASS for breaking through the wall of plaintiff's houſe. Pleas, not guilty, and a licence; to which there was a new aſſignment of exceſs.

Where to treſpaſs for breaking through the wall of the plaintiff's houſe, the defendant pleaded a licence, to which the plaintiff new aſſigned *exceſs*; it appeared that the plaintiff had given the defendant leave to do what was neceſſary for repairing his own houſe, which adjoined the plaintiff's; and it was held, that the workmen employed to do the repairs were competent witneſſes for the defendant to diſprove the exceſs, without a releaſe.

It appeared that the treſpaſſes complained of had been committed in repairing the defendant's own houſe; and his defence was, that having obtained the plaintiff's leave to do what was neceſſary in repairing it, nothing more had been done. To eſtabliſh this, he propoſed to call the workmen employed by him in doing the work.

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CUTHBERT v. GOSTLING.

A. Moore for the plaintiff contended, that they were incompetent witneſſes without a releaſe, as if they had been guilty of any exceſs, and the plaintiff ſhould recover in this action, they would be liable over to the defendant. But—

Lord ELLENBOROUGH ſaid, it by no means followed that they would be liable to the defendant, if the plaintiff had a verdict; nor did it appear that they were at all intereſted in the event of the ſuit. The caſe was quite different from an action for the negligence of ſervants in driving againſt carriages, or running down ſhips; for there, if the maſter be liable to the plaintiff, the ſervants are neceſſarily liable to the maſter; and they have a direct intereſt to defeat the action.

The workmen were accordingly examined; and the defendant had a verdict.

E. Moore and *E. Lawes* for the plaintiff.

Topping and *Puller* for the defendant.

[Attornies, *Jones* and *Vincent*.]

Saturday, Feb. 19.

DOE d. SCHOFIELD and Others *v.* ALEXANDER, Widow.

In ejectment where the defendant comes in as landlord, to connect him with the premiſes to which the leſſor of the plaintiff makes title, it is enough to ſhew that the declaration in ejectment was ſerved upon the tenant in poſſeſſion of theſe premiſes.

THIS was an ejectment by the aſſignees of one *Wells*, a bankrupt, to recover poſſeſſion of a houſe and premiſes of which he was ſeized in fee, and which he

had

had conveyed to the defendant on the eve of his bankruptcy, by a deed which was contended to be fraudulent.

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The leſſors of the plaintiff having made out their title, proved, that the ejectment was ſerved upon a perſon of the name of *Hart*, who was then in poſſeſſion of the premiſes, and gave in evidence the rule of Court in the common form, whereby the defendant was allowed to come in to defend as landlady.

Topping for the defendant inſiſted, that it was neceſſary to prove that *Hart* held the premiſes as her tenant, and cited *Smith d. Taylor* v. *Mann*, 1 *Wilſ.* 220, where it was held, that where the landlord is made defendant, "it is neceſſary to prove the defendant, or his *tenant* "in poſſeſſion of the premiſes; for the rule is, that "the landlord ſhall defend for the premiſes only "whereof his tenants are in poſſeſſion; and the party "does not admit himſelf to be landlord of any pre-"miſes which the plaintiff may make title to, but of "ſuch only as were in poſſeſſion of thoſe tenants." This caſe is recognized in *Goodright d. Balch* v. *Rich*, 7 *T. R.* 327, in which it was decided, that in the common caſe, where the tenant in poſſeſſion defends, the leſſor of the plaintiff is bound to prove him in poſſeſſion of the premiſes, notwithſtanding the rule to confeſs leaſe, entry and ouſter.

Lord Ellenborough.—Where the defendant comes in as landlord, I think he muſt neceſſarily be taken to acknowledge that he is landlord of the premiſes for which the ejectment is brought. He does not

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not acknowledge himſelf to be landlord of any premiſes to which the leſſor of the plaintiff may make title. But it ſeems prepoſterous to allow him to deny that he is landlord of thoſe premiſes, of which the leſſor of the plaintiff would have recovered poſſeſſion by judgment againſt the caſual ejector, if he had not interpoſed. Shall he be permitted to ſay firſt, "I am "landlord of theſe premiſes, to which you have no "right of entry;" and then, the right of entry being proved, "the perſon in poſſeſſion is not my tenant, "and I have nothing to do with them." All that is neceſſary I conceive is, to prove the identity of the premiſes for which the defendant comes in to defend as landlord; and that is ſufficiently done by proving the ſervice of the ejectment upon the tenant in poſſeſſion. Here the leſſors of the plaintiff have ſhewn what premiſes they go for in this action, by proving the ſervice of the ejectment upon *Hart* while in poſſeſſion of them; and the defendant is concluded by having come in and claimed to defend for them as landlady.

The leſſors of the plaintiff had a verdict.

Garrow, A. G., and *Marryat*, for the leſſors of the plaintiff.

Topping and *Littledale* for the defendant.

[Attornies, *Galt* and *Shaw*.]

Vide Fenn d. Phillips v. Cooke, ante 512.

DODD *v.* NORRIS.

Saturday, Feb. 19.

THIS was an action for ſeducing the plaintiff's daughter *per quod ſervitium amiſit.*

In an action for ſeducing the plaintiff's daughter *per quod ſervitium amiſit*, the daughter is not bound to anſwer in croſs-examination, whether ſhe had not previouſly been criminal with other men.

In ſuch an action evidence cannot be admitted that the defendant accompliſhed the ſeduction by means of a promiſe of marriage.

Nor does the mere croſs-examination of the daughter to ſhew that ſhe had been guilty of improper conduct, entitle the plaintiff to call other witneſſes to her character.

The daughter having been called as a witneſs for the plaintiff, was aſked in croſs-examination, whether before her acquaintance with the defendant ſhe had not been criminal with other men?

Lord ELLENBOROUGH ſaid this was a queſtion ſhe was not bound to anſwer; and that the point having been referred to the Judges, they were all of the ſame opinion.

She was afterwards croſs-examined at conſiderable length, to ſhew that ſhe had ſubmitted herſelf to the defendant's embraces under circumſtances of extreme indelicacy, and had been guilty of great levity of conduct.

In re-examination ſhe was aſked, whether the defendant had not previouſly given her a promiſe of marriage?—This was objected to as an improper queſtion.

Garrow, A. G., allowed that it was not competent to him to put this queſtion in the examination in chief, but inſiſted, that after the croſs-examination it became material to ſhew that ſhe had admitted the familiarities of the defendant, in the proſpect he had held out to her of becoming his wife.

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Lord ELLENBOROUGH.—I think you may aſk her whether he paid his addreſſes to her in an honourable way. Farther than that you can on no account go. To admit evidence of a direct promiſe of marriage, would be to allow the mother to recover damages for a breach of that promiſe, upon the teſtimony of the daughter.

Garrow, A. G., then propoſed to call witneſſes to the character of the daughter, which he ſaid had become neceſſary, by the courſe of the croſs-examination. But—

Lord ELLENBOROUGH ruled, that he was not at liberty to do ſo, as no evidence of her bad character had been given on the part of the defendant. The queſtions put to herſelf in croſs-examination there was an ample opportunity of explaining, as far as the truth would permit, when ſhe came to be re-examined.—His Lordſhip obſerved, that the law conſidered this an action of treſpaſs for aſſaulting the daughter, whereby the parent loſt her ſervice; and although by ſome anomaly, when the loſs of ſervice was eſtabliſhed, a further compenſation was allowed for the injury to the parental feelings, it was neceſſary to watch that this anomaly ſhould not be carried farther, and that the original ſcope of the action ſhould not be entirely loſt ſight of.

The plaintiff had a verdict for £75.

Garrow, A. G., and *Bevan*, for the plaintiff.

Park for the defendant.

Attornies, *Price* and *Finchett*.]

Vide Bamfield v. Maſſey, 1 Campb. 460.

KEIGHTLEY *v.* BIRCH and Another.

Saturday, Feb. 19.

THIS was an action againſt the late Sheriffs of London for improper conduct in the execution of a writ of fi. fa. whereby they were directed to levy the ſum of £45. upon the effects of *J. Smith*, beſides poundage, &c. The return was, that they had taken goods and chattels of *Smith*, of the value of £72. 15*s.* 10*d.*; that they had paid ſeveral ſums, amounting to £34. 3*s.* 7*d.* for King's taxes, &c. and the reſidue of the money levied, viz. £38. 12*s.* 3*d.* they had paid to one *Beveridge*, the landlord of the premiſes, for arrears of rent.

In an action againſt the ſheriff for an improper return to a fi. fa. which ſtated that he had paid a ſum of money to the landlord of the premiſes for arrears of rent, it is not enough for him to prove that he paid the money to the landlord; but he ſhould adduce ſome evidence that the rent was due.

For this purpoſe, the landlord of the premiſes is not a competent witneſs.

The ſheriff having taken goods in execution under a fi. fa. is not juſtified in ſelling them to the higheſt bidder greatly under their value; but if he cannot obtain a reaſonable price, ſhould return that they remain in his hands for want of buyers.

The execution went in the 23d of March laſt. On the 24th, *Beveridge*, the landlord, diſtrained upon the goods for £62. being five quarters rent alleged to be due. A man remained in poſſeſſion under the diſtreſs for three days, and then withdrew, having given notice to the ſheriffs' officer of the landlord's claim. The goods, which were ſworn to have been worth between £300. and £400. were afterwards ſold by the ſheriffs by public auction for £72. 15*s.* 10*d.* The ſums mentioned in the return for taxes, &c. were then paid, and the remaining £38. 12*s.* 3*d.* was handed over to *Beveridge*, the landlord. *Smith*, the defendant in the execution, being called, ſwore that he had paid all arrears of rent at the preceding Chriſtmas, and that at the time of the execution there was no rent due. Upon theſe facts it was contended,

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tended, that the ſheriffs were liable, 1ſt, for paying the money to the landlord when there was no rent due; and, 2dly, for ſelling the goods ſo much under their value; whereas, had they been properly ſold, they were more than ſufficient to ſatisfy both the landlord and the judgment creditor. The declaration contained counts adapted to both theſe grievances.

Garrow, A. G. with regard to the firſt, inſiſted, that it was immaterial to the Sheriffs whether the rent was due or not, if they had acted *bona fide*, and the rent had been demanded of them. By 8 Ann. c. 14. they were bound to pay a year's rent to the landlord before removing the goods from the premiſes. If a year's rent was demanded of them, they had no means of knowing whether or not it was due. If they refuſed to pay it, they were liable to an action at the ſuit of the landlord. Therefore, all that the law could require of them was, that they ſhould act with good faith, and according to a ſound diſcretion. Here not only was there a demand for rent, but a diſtreſs for five quarters, at the rate of £50. a-year, actually came in, while they were in poſſeſſion of the goods upon the premiſes; they were therefore bound to pay one year's arrears, as far as the ſum levied would go, after incidental charges were defrayed; and if the rent was not due, the plaintiff's remedy was againſt the landlord—in *caſe* for a deceitful repreſentation, or *aſſumpſit* for money had and received.

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Lord ELLENBOROUGH. I am of opinion that the ſheriffs are liable in this action, if there was no rent due. They might have required reaſonable evidence from the landlord (ſuch as a ſight of the leaſe) that the rent was due before they paid him the money. Sheriffs are often placed in very difficult circumſtances, and muſt act at their peril. When they proceed *bonâ fide*, they will be indulged with time to make a return till an indemnity is offered; but they muſt eſtabliſh the truth of their return when it is once made. The ſtatute of Anne only authorizes the ſheriff to pay to the landlord ſuch arrears of rent *as are or ſhall be due*. The defendants, therefore, ought to give ſome evidence that a ſum of £38. 12*s*. 3*d*. was due for rent from *Smith* to *Beveridge*. I ſhould be ſatisfied with ſlight evidence of this fact to make out a primâ facie caſe in their favour. But, on the contrary, we have poſitive evidence that no rent was due.

Garrow, A. G. then propoſed to call *Beveridge*, the landlord, to prove the rent due; but Lord Ellenborough held that he was an incompetent witneſs, as, if the preſent action ſucceeded, he would be liable to an action at the ſuit of the ſheriffs, in which this judgement would be evidence of ſpecial damage.

Garrow, A. G. upon the ſecond ground, inſiſted that the ſheriffs could not be liable, as they had ſold the goods by public auction, for the higheſt price they would fetch.

Lord ELLENBOROUGH. If the goods taken in execution really were worth £300. or £400., I think

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the ſheriffs are liable for ſelling them for £72. 15s. 10d. The return ought to have been, that they had taken goods which remained in their hands for want of buyers. If a chattel worth £1,000. is put up to ſale, and only £5. is bid for it, the ſheriff ought not to part with it for that ſum, and he may fairly ſay that it remains in his hand for want of a buyer. He ought to wait for a *venditioni exponas*, the meaning of which is "ſell for the beſt price you can obtain."

The Jury found for the plaintiff, damages £45.

Topping and *Eſpinaſſe* for the plaintiff.

Garrow, A. G., and *Long*, for the defendant.

Vide Leader v. Danvers, 1 Boſ. & Pul. 359.

ADJOURNED SITTINGS AT GUILDHALL.

Friday, Feb. 25.

DITCHAM v. BOND.

To treſpaſs for breaking and entering the plaintiff's houſe, and making a noiſe and diſturbance therein, the defendant pleaded a licence, to which the plaintiff replied *de injuria*.—*Held*, that the plea was ſupported by evidence that the plaintiff kept a billiard table in the houſe, at which all perſons were uſually permitted by him to play at regulated prices, and that the defendant entered the houſe for the purpoſe of going to the billiard room, although while in the houſe he was guilty of a treſpaſs in aſſaulting the plaintiff.

TRESPASS for breaking and entering the plaintiff's dwelling-houſe, and making a great noiſe and diſturbance therein, &c. and for aſſaulting and beating him and his ſervant.

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The defendant pleaded to breaking and entering the houſe a licence, with other pleas to the reſt of the declaration.

Replication to all the pleas, *de injuriâ*, &c.

It appeared that the plaintiff keeps ſeveral billiard tables in his houſe, at which all perſons may play, paying certain regulated prices by the game or hour. There is no board or ſign on the outſide of his houſe, ſtating that billiard tables are kept there; but the outer door always remains open, and gentlemen walk up ſtairs to the billiard rooms, if any happen to be diſengaged, or if not, they wait in a parlour below. On the 18th of May the defendant entered the houſe, and inſiſted on walking up ſtairs to the billiard rooms, although they were all engaged; ſtruck the plaintiff, who wiſhed to prevent him, and made a great diſturbance in the houſe for a conſiderable while after.

It was inſiſted for the defendant, that he was entitled to a verdict on the plea of licence, as the plaintiff muſt be ſuppoſed to have conſented to all perſons entering the houſe for the purpoſe of playing at billiards. The defendant might have been guilty of ſome exceſs; but that could not be taken advantage of for want of a new aſſignment.

On the other ſide it was contended, that the keeping of billiard tables under theſe circumſtances was no evidence of licence, and that at any rate the defendant by his ſubſequent conduct had made himſelf a treſpaſſer *ab initio*.

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Lord ELLENBOROUGH.—I think the plaintiff was bound to new-assign. The keeping of a billiard table amounts to a licence given by the party. The distinction is taken in the *Six Carpenters Case* (*a*) between a licence given by the party and a licence given by the law. If the defendant exceeds the latter, as by committing a trespass in an inn, he is a trespasser *ab initio*; but an excess of the former must be taken advantage of by new assignment.

The plaintiff had a verdict, with £5. damages for the assault upon himself and his servant.

Garrow, A. G., and *Cross*, for the plaintiff.

Park and *Campbell* for the defendant.

[Attornies, *Latimer* and *Osbaldeston*.]

(*a*) 8 Rep. 146. a.

In the ensuing term a motion was made to arrest the judgment in this case, on the ground that the plaintiff could not join in the same declaration a count for assaulting himself, and a count for assaulting his servant, *per quod servitium amisit*; but the Court held, that an action for beating the plaintiff's servant *p. q. f. a.* is properly an action of trespass, and may be well joined with counts for assaulting and beating the plaintiff himself, or breaking and entering his house.

WILSON

WILSON *v.* FREEMAN.

Monday, Feb. 28.

Notwithſtanding a notice by carriers that they will not be accountable for goods of a particular deſcription, above the value of 5*l.* "unleſs ſpecified and paid for as ſuch when delivered;" *held* that they were liable for damage done to an article of this deſcription, much above the value of 5*l.* although not *paid for as ſuch when delivered*, their book-keeper having been then informed of its value, and deſired to charge for it what he pleaſed, which ſhould be paid, provided it was taken care of.

THIS was an action againſt the defendant as a carrier, for negligence in the carriage of a looking-glaſs from London to Bilderſtone, in Suffolk, whereby it was broken.

The looking-glaſs packed in a caſe, directed to the plaintiff, and marked "glaſs," was delivered to the defendant's book-keeper at the Saracen's Head, Snow Hill. The book-keeper being told what it was, ſaid he ſhould charge four cwt. for it, although in point of fact it weighed but three. The perſon who brought it anſwered, "Charge what you pleaſe; you ſhall be paid for it, provided you take care of it. It is worth £80. It is in your care, and I am done with it." No money was then paid, except 6*d.* for booking. The looking-glaſs, when unpacked in Suffolk, was found to have been broken on the journey.

The defence was reſted upon the effect of a notice ſtuck up in the defendant's waggon office, intimating that the proprietors "would not be accountable for any China, *glaſs*, or contents, plate, watches, caſh, bank notes, bills, jewels, or writings, however ſmall the value, nor for any other article of more than £5. value, if loſt or damaged, unleſs ſpecified, *and paid for as ſuch when delivered* at their offices in town or to their agents in the country." Here nothing had been paid for the looking-glaſs when it was delivered, and the defendant therefore was not accountable for the damage it had ſuſtained.

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Lord ELLENBOROUGH held, however, that as the book-keeper knew what the article was, and was told its value, and was desired to charge what he pleased, the payment of the money was dispensed with, and the notice was unavailing.

Verdict for the plaintiff.

Garrow, A. G., *Holroyd*, *Alderson*, and *Erskine*, for the plaintiff.

Park and *Comyn* for the defendant.

[Attornies, *Chisholm* and *Pope*.]

Vide Beck *v.* Evans, ante 267.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

Coram CHAMBRE, J.

HART and Another *v.* SATTLEY.

If goods are ordered verbally, the delivery of them to a carrier is sufficient to bind the contract according to the statute of frauds, where the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance.

THIS was an action for goods sold and delivered, to recover the price of a hogshead of gin.

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The plaintiffs are ſpirit merchants in London, who had been in the habit of ſupplying ſpirits to the defendant, a publican near Dartmouth in Devonſhire. In theſe previous dealings the courſe had been for the plaintiffs to ſhip the goods on board a Dartmouth trader in the river Thames, and the defendant had always received them. The hogſhead of gin in queſtion was verbally ordered by the defendant of the plaintiffs' traveller, and was ſhipped in the ſame manner as the others had been. There was no evidence either that it had been delivered to the defendant in Devonſhire, or that he had refuſed to accept it.

Lens, Serjeant, for the Defendant, contended, there was no ſufficient contract here, according to the 17th ſection of the Statute of Frauds, which in a caſe like this, where the delivery of the goods is relied upon, requires that "the buyer ſhall accept part of the goods ſold, and actually receive the ſame."

CHAMBRE, J.—I think under the circumſtances of this caſe, the defendant muſt be conſidered as having conſtituted the maſter of the ſhip his agent to *accept and receive the goods*.

Verdict for the plaintiff.

Beſt, Serjeant, and *Richardſon*, for the plaintiff.

Lens, Serjeant, for the defendant.

[Attornies *Lane* and *Price*.]

Vide Kent v. Huſkinſon, 3 Boſ. & Pul. 233. Elmore v. Stone, 1 Taunt. 458.

Coram

Coram GIBBS, C. J.

HOLROYD and Others, Aſſignees of HALL, a Bankrupt, *v.* WHITEHEAD and Others.

MONEY had and received.

Where a trader departs from his dwelling-houſe on account of domeſtic diſſentions, if he makes no arrangements for carrying on his buſineſs in his abſence, and he foreſees that as a neceſſary conſequence his eſtabliſhment muſt be broken up, and his creditors muſt be delayed, which events accordingly happen; he thereby commits an act of bankruptcy.

Stat. 19 Geo. 2. c. 32. only protects payments in reſpect of bills of exchange after a ſecret act of bankruptcy, where the bankrupt was liable on the bills to the party receiving the money.

The bankrupt was a hoſier in Baſinghall-ſtreet. On Wedneſday the 5th of Auguſt 1812, he departed from his dwelling-houſe, having left behind him a letter directed to his wife, in which he ſays, that he had taken leave of her for ever, and that certain ſuppoſed miſconduct of hers had driven him away. He obſerves, ſhe would ſoon be turned out by his creditors; that there would be 20s. in the pound for them; but that, be it leſs or more, he had done with it. He concludes by deſiring her to ſee that no one took goods out of the warehouſe in preference. Before going, he gave no directions for carrying on his buſineſs during his abſence. He returned for a ſhort time in the evening of Saturday the 8th. In the mean time, a creditor had called for money, and was obliged to go away unſatisfied. The bankrupt was ſeveral hours at home on the Sunday. He returned again early on Monday morning, and ſat the greater part of that day in a retired room above ſtairs, where he had not been accuſtomed to ſit except when he was unwell. On the Tueſday he was denied to a creditor by his own orders; and a commiſſion of bankrupt ſoon after iſſued againſt him.

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The defendants were his bankers. On the Saturday, without knowledge of his insolvency, they had paid a bill of exchange for £300, accepted by him, payable at their house, for which they had no funds of his in their hands. For the purpose of reimbursing them, he sent them, at nine o'clock on the Monday morning, the £250, to recover which this action was brought.

Shepherd, S. G., for the defendants, contended, 1st, that there was no act of bankruptcy before the payment of the money; and 2dly, that the payment was protected by 19 Geo. 2. c. 32.—1. The bankrupt departed from his dwelling-house on the Wednesday, not with intent to delay his creditors, but because he had quarrelled with his wife. He says there was 20s. in the pound for them all, and there is no proof that his conduct was at all influenced by pecuniary embarrassments. Suppose that on the Saturday, having repented of his separation from his wife, he had returned and continued regularly to carry on his business, could it be said that he had committed an act of bankruptcy? Surely the effect of his conduct could not be determined by what took place in the following week. 2. The defendants were "really and bonâ fide creditors of the bankrupt in respect of a bill of exchange really and bonâ fide accepted by such bankrupt in the usual and ordinary course of trade and dealing." Therefore they were not "liable to refund to the assignees of such bankrupt's estate the money which, before suing forth the commission, was really and bonâ fide, and in the usual and ordinary course of trade and dealing, received by them of the bankrupt before

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before ſuch time as they knew he was become a bankrupt, or that he was in inſolvent circumſtances." They were his creditors in reſpect of the bill of exchange for £300. which he had accepted payable at their houſe; and the payment of the £250. to reimburſe them, was in the ordinary courſe of trade and dealing. The caſe comes within the very words as well as ſpirit of the act of parliament.

GIBBS, C. J. obſerved, that the bankrupt might be conſidered to have committed an act of bankruptcy by departing from his dwelling-houſe on the Wedneſday, although the ſtep which he took aroſe chiefly from domeſtic diſſenſions. He evidently contemplated his trading as at end. He had no intention to return. He left no directions how the buſineſs was to be carried on in his abſence. He deſired that no preference ſhould be ſhewn to his creditors. One of them called while he was away, and appears to have been delayed. It was not enough that he left his property behind, even if he believed that it would produce 20s. in the pound to all his creditors. They had a right likewiſe to his perſon. Where creditors have been delayed, the trader has been held to have committed an act of bankruptcy, although that was not his principal motive, as he muſt be ſuppoſed to foreſee and intend the neceſſary conſequences of his own act.—Upon this part of the caſe, the Chief Juſtice directed the jury to ſay, whether they believed that the bankrupt left his houſe with intent to delay his creditors, and whether they found as a fact that a creditor was thereby delayed. His lordſhip obſerved, that in his own opinion there was a ſufficient act of bankruptcy, if the bankrupt

bankrupt left his houſe with intent to delay his creditors; but he wiſhed to give an opportunity to take the opinion of the Court upon this queſtion, if the jury ſhould think that no creditor was in point of fact delayed (*a*).—With regard to the ſecond point, he expreſſed himſelf clearly of opinion, that the payment, if made after an act of bankruptcy, was not protected by the ſtatute. He conſidered the 19 G. 2. c. 32. only to apply to goods ſold, or to caſes where the bankrupt was liable on the bill of exchange to the party receiving the money. The defendants in this inſtance were not creditors of the bankrupt on a bill of exchange, but for money lent, or for money paid at his requeſt. The £250 was ſent to them as the re-payment of a loan, and not to diſcharge the bankrupt's liability to them on a bill of exchange (*b*).

The jury found, that the bankrupt left his houſe with intent to delay his creditors, and that a creditor was thereby delayed; and the plaintiffs recovered the amount of their demand.

Lens, Serjt., and *Campbell*, for the plaintiffs.

Shepherd, S. G. and *Beſt*, Serjt. for the defendants.

[Attornies, *Holt & Farren* and *Palmer & Co.*]

(*a*) Robertſon v. Liddell, 9 Eaſt, 487.

(*b*) See Tamplin v. Diggins, 2 Campb. 312.

Wednesday, March 2.

RALPH ADAMS and Others *v.* MALKIN and Another.

An attorney cannot be made a bankrupt as a money ſcrivener, unleſs he has been in the habit of having money depoſited with him for the purpoſe of laying it out on ſecurities.

THIS was an iſſue directed by the Lord Chancellor to try whether one *Samuel Thomas Adams*, againſt whom a commiſſion of bankrupt iſſued, bearing date 21ſt April 1812, was at the time of the date and iſſuing of the ſaid commiſſion of bankrupt againſt him, a trader, as being a money ſcrivener or broker within the ſeveral ſtatutes relating to bankrupts, ſome or one of them.

The commiſſion had been ſued out by the plaintiffs, and the defendants were two creditors who petitioned to ſuperſede it.

Samuel Thomas Adams, the bankrupt, for a number of years before his bankruptcy, and down to the time when that event happened, lived in Great Ruſſell Street, Bloomſbury, where he carried on the buſineſs of an attorney and ſolicitor, acting for his clients, and making out his bills as attornies and ſolicitors uſually do. The evidence relied upon, to ſhew that he was likewiſe a money ſcrivener, was in ſubſtance as follows: The plaintiffs, who are his relations and were brick and tile makers, having no banker of their own, uſed to depoſit bills and money with him to have them lodged with his bankers; but he did not lay out the money for them, and they received it back again as they wanted it.—He had authority from a Mr. *Hake* to ſpeculate in the purchaſe of houſes for him. He accordingly negotiated for *Hake* the purchaſe of a chapel in Oxendon-ſtreet, and of ſome freehold and leaſehold houſes in Pall Mall.—He was afterwards con-

cerned in re-selling part of these to a *Captain Cooke*. About £1,000. of *Captain Cooke*'s purchase-money remained on mortgage, and the mortgage was prepared in the bankrupt's office. He received the interest on the mortgage, and the rents for some of the houses which remained unsold.—He was employed by *Captain Cooke* in the sale of some property, at Brompton, to a Mr. *Sandby*, and when the bills given in payment were dishonoured, he assisted in raising money to pay them.—He was likewise concerned in some pecuniary transactions between *Sandby* and the *Earl of Moira*, in the course of which, money passed through his hands, but none was deposited with him.—He sold a debenture on Drury-Lane Theatre for a *Mr. Maunde*, and negotiated an annuity for him. It did not appear that the money advanced as the price of the annuity was ever in his hands. He received money from *Maunde* to pay off the interest. He carried on a treaty for the redemption of the annuity, and was intrusted to deposit money at a banker's for that purpose.—He sold out stock for one *Paul*, and negotiated a loan for him, on the security of stock belonging to Paul and his wife. —One *Green* advanced him £100.; but although he had given a different account of it, this in truth was by way of loan, and interest was to be paid for the money. —The last transaction proved was with a *Mr. Jackson*, who employed him to negotiate a loan. The money was procured from *Sandby*, and passed through the bankrupt's hands.—He charged as an attorney for all the business he thus transacted.

Shepherd, S. G., for the plaintiffs, contended, that upon these facts *S. T. Adams* was a money scrivener within

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within the meaning of the act of parliament. Although he was an attorney, he might likewiſe act as a ſcrivener; and if he did, he would not be leſs ſubject to the bankrupt laws than if he carried on the latter buſineſs excluſively. In modern times this buſineſs is not carried on by a ſeparate claſs of men, but is generally conducted by attornies. The ſtatute 21 James I. c. 19. renders liable to the bankrupt laws "all and every perſon or perſons uſing or that ſhall uſe the trade of merchandize, &c. *or ſhall uſe the trade or profeſſion of a ſcrivener, receiving other men's monies or eſtates into his or her truſt or cuſtody.*" Therefore a ſcrivener appears to be a perſon entruſted with money, and who prepares ſecurities, whether mortgages, annuity deeds, bonds, or other inſtruments. Mr. *Adams* acted in this character. Whether he was a trader or not, does not depend upon the number of inſtances of his trading. One or two inſtances, diſtinctly proved, are ſufficient to bring him within the ſcope of the bankrupt laws. It is not neceſſary that he ſhould ſeek his livelihood only as a ſcrivener. If that were ſo, no perſon could now be made a bankrupt in that character. But commiſſions of bankrupt are conſtantly ſued out and ſuſtained againſt attornies as money ſcriveners, they having been accuſtomed, in addition to their buſineſs as attornies, to receive other perſons money, and to prepare ſecurities in the manner purſued by Mr. *Adams*.

Beſt, Serjt. *contrà*.—*Adams* merely acted in the capacity of an attorney, and it would be extremely miſchievous if a perſon acting in this manner were ſubject to the bankrupt laws. Attornies and ſolicitors do not,

as ſuch, engage in thoſe ſpeculations which render their capital uncertain. They are not expoſed to the hazards of mercantile men, and ought neither to be expoſed to the ſeverity, nor entitled to the benefits of the bankrupt laws. To make an attorney a trader as a ſcrivener, it is not enough that he prepares ſecurities; he muſt receive "other men's monies or eſtates into his truſt or cuſtody." By preparing the ſecurities he may be a ſcrivener; but he is not ſuch a ſcrivener as the ſtatute deſcribes. Although it ſhould appear that in the courſe of ſix or ſeven years, this gentleman might once, twice, or thrice have received other men's monies, that would not ſubject him to the bankrupt laws; there muſt be a habit of dealing as a money ſcrivener; he muſt have ſought his living by it. An occaſional receiving of money incidental to his buſineſs as an attorney is for this purpoſe immaterial. There is no attorney, and there is hardly a perſon in any other ſituation of life, who has not received other men's money into his poſſeſſion; but no one is ſubject to the bankrupt laws by receiving money, who is not in the habit of receiving it as a money ſcrivener. In this caſe *Adams* is not proved in any one inſtance to have had other men's monies or eſtates in his truſt or cuſtody. He was merely employed to hand over the money from one perſon to another; it never remained in his poſſeſſion for him either to uſe it or to lay it out. A ſervant might as well be conſidered a money ſcrivener, who pays money to tradeſmen by his maſter's orders. The money ſcrivener referred to by the ſtatute is a character which no longer exiſts. *Adams*, in all the tranſactions given in evidence, was employed and was paid as an attorney; he never charged brokerage or commiſſion; he made out a bill for deeds

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and attendances like any other attorney. *Hamſon* v. *Harriſon*, 2 *Eſp. Caſ.* 555. is a ſtrong authority to ſhew that neither Adams, nor any other attorney of the preſent day, can be made a bankrupt as a money ſcrivener. Lord Kenyon there ſays, "When the ſtatute paſſed, the buſineſs of a ſcrivener was well underſtood; the ſtatute had thoſe particular perſons in view who, *eo nomine*, carried on that buſineſs. The acts relied upon to conſtitute a ſcrivener muſt apply to perſons who uſed to act as they did, not where a perſon receives and pays money as the bankrupt in the preſent caſe has done."

GIBBS, C. J.—The queſtion is, whether *Samuel Thomas Adams*, againſt whom a commiſſion of bankrupt iſſued on the 21ſt of April 1812, was on that day a trader as being a money ſcrivener. There is ſome difficulty at the preſent day in underſtanding correctly what a money ſcrivener is. There is no living character to refer to as an example. The buſineſs of a money ſcrivener, as it was formerly carried on, has been diſcontinued: it has been ſubdivided into different branches, which have been taken up by different deſcriptions of perſons. Formerly the buſineſs was well known. The old books are full of caſes ariſing out of the tranſactions of money ſcriveners; to theſe we muſt look to form an accurate judgment of the character intended by the legiſlature. After the ſtatute of Elizabeth, and before the ſtatute of James, it was conſidered doubtful whether a ſcrivener was ſubject to the bankrupt laws. The latter ſtatute ſubjects to the bankrupt laws all thoſe "who uſe the trade or profeſſion of a ſcrivener, receiving other men's monies or eſtates into their truſt or cuſtody." Thus the per-

ſon to be conſidered a ſcrivener muſt carry on the trade or profeſſion; it muſt be an occupation to which he reſorts in order to gain his living. To be a ſcrivener within the meaning of the ſtatute, he muſt likewiſe, in the courſe of this occupation, receive other men's monies into his truſt or cuſtody. It appears from the old caſes, that before bankers and brokers were ſo eaſy to be found, the ſcrivener was the perſon with whom people were accuſtomed to depoſit their money, in order that he might lay it out for them when he ſhould find a proper opportunity. The ſcrivener, in the mean time, had the uſe of it, and could not be queſtioned for the profit he made of it till he laid it out; he was truſted as a banker. It was not a ſpecific ſum which in monies numbered he was to keep in his cheſt; he gave credit for it to the party, who had ſufficient confidence in him that he would lay it out to advantage as ſoon as an opportunity offered. It was ſeen to be of great importance that this deſcription of perſons ſhould be ſubject to the bankrupt laws; for through them the property of others was expoſed to the riſks of trade. They were truſted with other men's property as traders now are; and therefore it was of conſequence to the public, that if any calamity happened to them, there ſhould be the ſame ſummary means which had been before deviſed with reſpect to other perſons in trade, of getting at their effects, and making an equal diſtribution among all their creditors. They were conſequently included in the ſtatute of James I. Since the period to which I have been referring, the buſineſs of a money ſcrivener has ceaſed. It is related in the life of Dr. Johnſon, that a perſon who went by the name of *Jack Ellis* was the laſt of the profeſſion. He was a co-temporary of Johnſon, and is mentioned by

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him with great reſpect (*a*). At the preſent day, the banker occupies one department of the buſineſs of the ſcrivener, by being the depoſitory of the money, and the attorney the other, by drawing the ſecurities. The banker would not be an attorney, though he were occaſionally to fill up bonds for his cuſtomers; nor does the attorney become a money ſcrivener, though on particular occaſions he incidentally has the money of his clients to lay out for them. In order to make a man a money ſcrivener, he muſt carry on the buſineſs of being truſted with other people's monies to lay out for them as occaſion offers. It is not being ſent with the money of his client, or receiving it from the perſon with whom his client may have previouſly contracted, that will make an attorney a money ſcrivener. In that part of the tranſaction, he is no more than a perſon employed to fetch and carry. Having negotiated the loan, and drawn the deeds, his happening to receive and pay the money, is incidental to his buſineſs of an attorney. Nor if on one or two occaſions money were depoſited with him to lay out, would that conſtitute him a money ſcrivener. He muſt be carrying on generally the buſineſs of a money ſcrivener. That muſt be part of his known occupation. I cannot

(*a*) JOHNSON.—"It is wonderful, Sir, what it to be found in London. The moſt literary converſation that I ever enjoyed was at the table of Jack Ellis, a money ſcrivener behind the Royal Exchange, with whom I at one period uſed to dine generally once a-week."

Note by Boſwell. This Mr. Ellis was, I believe, the laſt of that profeſſion called ſcriveners, which is one of the London companies, but of which the buſineſs is no longer carried on ſeparately, but is tranſacted by attornies and others. He was a man of literature and talents. *Boſwell's Life of Johnſon, 3d Vol. p. 20.*

expreſs

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expreſs what I mean to convey more correctly than in the words of the preſent Lord Chancellor, in a caſe before him: "The next queſtion is, as to the trading "as a ſcrivener. That does not depend upon the "fact, whether the bankrupt has or has not occa- "ſionally done acts which a ſcrivener peculiarly and "properly would have done; not upon what he may "have done upon one day and what upon another "day; but upon his intention generally to get a living "by ſo doing (*a*)." Though an attorney may have incidentally acted as a ſcrivener, that is not ſufficient: Though money may have been depoſited with him, for which he was afterwards to ſeek a borrower, a few inſulated inſtances of that ſort occurring in the courſe of his buſineſs as an attorney, would not bring him within the operation of the bankrupt laws; for that would not be "uſing the trade or profeſſion of a ſcri- "vener, receiving other men's monies or eſtates into "his truſt or cuſtody."

Looking now to the facts of this caſe, it appears that Mr. *Adams* merely acted as a common attorney. In the various tranſactions that have been ſpoken to, I can diſcover nothing which a common attorney would not undertake. It is ſaid he acted as a money ſcrivener for the plaintiffs. They, being his relations, and having no bankers of their own, depoſited money and bills with him to be lodged with his bankers. But he was not to lay out the money for them, and he cannot be ſaid to have received it as a ſcrivener. In his dealings with *Hake*, *Cooke*, and *Sandby*, he merely negotiated the ſale of eſtates, drew a mortgage deed, received rent, and aſſiſted in procuring the loan of money.

(*a*) Ex parte Paterſon, 1 Roſe, 402.

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It does not appear that he ever was intruſted with the money of theſe or any other perſons to lay out for them at his diſcretion; although he was ſometimes the hand employed by one party to deliver over the money to another, when it was advanced or when it was repaid. I take no particular notice of the inſtances in which it is ſtated that *Mr. Adams* negotiated the ſale of eſtates; for it is ridiculous to ſuppoſe that the tranſaction of ſuch common and ordinary buſineſs ſhould conſtitute a man a money ſcrivener. If *Green* had, as *Adams* repreſented, depoſited the £100. with him till he (*Adams*) could find a borrower, *pro hac vice* he would have been a money ſcrivener; and a courſe of dealing of that deſcription would render him liable to the bankrupt laws, though one or two inſtances only would not have this effect. But it turns out that the money was advanced to *Adams* by way of loan, and that he was to repay it with intereſt to the lender. Then, as to *Maunde*'s annuity, the money paid as the conſideration for it does not appear ever to have been in *Adams*'s poſſeſſion, and the money with which it was to be redeemed, although it did paſs through his hands, never was applicable to his own uſe. It is not immaterial to obſerve, that all his charges to his employers are the common and uſual charges of an attorney. He charges for his trouble, whether his labours have been attended with a favourable or unfavourable reſult. However, I do not put the caſe upon that ground; for if he had even charged procuration money or commiſſion, this, in my opinion, would not have made him a ſcrivener, unleſs he had been intruſted with money as money ſcriveners were accuſtomed to be when the ſtatute paſſed. And I am inclined to think, that if he had been intruſted with money

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money as money ſcriveners formerly were, he would ſtill have been within the operation of the bankrupt laws, though he had not received procuration money or commiſſion, and had made the uſual charges for drawing the ſecurities. The eſſential point to conſider is, whether he had other men's monies or eſtates in his truſt or cuſtody as a ſcrivener (*a*).

Verdict for the defendants.

Upon an iſſue to try the validity of a commiſſion of bankrupt, a creditor is not a competent witneſs to ſupport the commiſſion, although he does not appear to have proved under it.

In the courſe of the trial Mr. *Hake* was offered as a witneſs for the plaintiffs. Being examined on the *voire dire*, he ſtated, that he was a creditor of *Adams* the bankrupt. The defendant's counſel having objected to his admiſſiblity,——

Shepherd, S. G., contended, that not having proved under the commiſſion, he had no intereſt to ſupport it. In many inſtances a commiſſion of bankruptcy is conſidered very diſadvantageous to creditors. This very iſſue came on to be tried in conſequence of the defendants, two of Mr. *Adams*'s creditors, having petitioned to ſuperſede the commiſſion. If a commiſſion of bankruptcy be eſtabliſhed, a creditor cannot obtain any fruits from a judgement at law; and if a certificate be obtained under it, his legal remedy is for ever barred. A diſtinction may likewiſe be taken between an action by aſſignees to recover property, and an iſſue to try whether the party was a trader; and a creditor may be admitted as a witneſs on the latter occaſion, though not on the former.

(*a*) *Vide* Ex parte Warren, 2 Sch. & Le Fr. 414. Ex parte Malkin, 1 Roſe, 406. Vin. Abr. tit. Scrivener, Vol. 19. p. 289. oct. ed.

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GIBBS, C. J.—I am of opinion that the witneſs is incompetent. A commiſſion of bankruptcy is evidently favourable to the creditors. A much more ſummary and effectual remedy is thereby given them than by an action at law; and as it paſſes the whole of the bankrupt's real as well as perſonal eſtate to the aſſignees, it immediately appropriates to the ſatisfaction of his debts that which can only be reached remotely and partially by common law proceſs. I conceive, therefore, that a creditor has an intereſt to ſupport the commiſſion under which he may prove and receive a dividend. Then if he be incompetent as a witneſs where the object is to recover 40*s.* by the aſſignees, he cannot be leſs incompetent upon an iſſue which is to determine whether all the bankrupt's property real and perſonal ſhall be divided among his creditors.

The witneſs was rejected (*a*).

Shepherd, S. G., *Onſlow*, Serjt., *Richardſon* and *Roſe*, for the plaintiffs.

Beſt, *Vaughan*, Serjeants, and *Campbell*, for the defendants.

[Attornies, *Adams* and *Hurd*.]

(*a*) In Williams v. Stevens, 2 Campb. 301. Lord ELLENBOROUGH is reported to have held that the creditor of a bankrupt who has not proved his debt under the commiſſion is a competent witneſs to ſupport the commiſſion, although not to increaſe the eſtate. But this caſe being cited before Lord ELDON, his lordſhip ſaid, "It is not enough that the creditor has not availed himſelf of the commiſſion; to make him a competent witneſs, it ought to be certain that he never will." Ex parte Oſborne, 1 Roſe, 387, 392.

[This case ought to have appeared amongst those decided after last Michaelmas Term.]

Coram MANSFIELD C. J.

BELL and Another *v.* KYMER and Others.

Monday, December 22.

Where a ship is chartered by a charter party under seal, which provides specifically for the payment of freight from the charterer to the owner, a person who receives goods carried by the ship in this voyage as indorsee of the bill of lading which makes them deliverable to order, or to assigns on payment of freight as per charter-party, is liable to pay freight accordingly, altho' he has paid over the proceeds of the goods to the person who indorsed the bill of lading to him before being called upon to pay the freight.

THIS was an action of assumpsit for freight. The declaration contained several special and general counts, similar to those in *Wilson* v. *Kymer*, 1 M. & S. 157.

By a charter party under seal, bearing date the 26th of January 1809, the plaintiff chartered the ship *Hind* from Joseph and John Corsbie, her registered owners, for a voyage from London to St. Domingo and back. The plaintiffs covenanted to provide a full homeward cargo for the ship, consisting of coffee and other goods, and to pay freight at the rate of 15*s.* per cwt. for the coffee, and for other goods in proportion, with 5 per cent. primage;—such freight and primage to be paid in manner following, viz. £800., part thereof, in and by a bill of exchange, payable in London two months after the day of the date of the ship's departure from Gravesend, and the remainder two months after the day on which she should be reported inward at the custom-house in the port of London.

The ship having arrived at St. Domingo, took on board there 1,151 bags of coffee, shipped by *J. N. D'Arcy*,

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D'Arcy, for which the maſter ſigned a bill of lading, dated 6th June 1809, making them deliverable "unto order or to aſſigns, paying freight for the ſaid goods as per charter party, with primage and average accuſtomed."

This bill of lading was indorſed by *D'Arcy* to *T. Goodall*, then acting as Admiral to Chriſtophe, Emperor of Hayti, and by *Goodall* to *Wm. Fletcher*, his agent in London. *Fletcher* indorſed the bill of lading to the defendants, who immediately accepted bills for him to a conſiderable amount on the ſtrength of the conſignment. The goods were landed by the defendants, and afterwards delivered out from the warehouſes of the Weſt India Docks to their order. It did not diſtinctly appear in evidence how the goods had been entered in the books of the Dock Company, but it was taken as a fact on both ſides, that the defendants got poſſeſſion of them by virtue of the bill of lading.

The plaintiffs did not call upon the defendants for the freight till May 1810, there having been ſome miſapprehenſion as to the perſons to whom the goods belonged. In the month preceding, the defendants had paid over to *Fletcher* the ſum of £4,000., being the balance due to him from the proceeds of the goods, without making any deduction for freight.

Shepherd, Serjt., contended, 1ſt, that under theſe circumſtances the defendants never were liable for the freight; and, 2dly, that even if they once were, they had been diſcharged by the laches of the plaintiffs.

1ſt,

1st, The defendants in this case acted merely as brokers; in that character they landed the goods; the bills of lading were indorsed to them to enable them to do so. They were the mere agents of *Fletcher*, who was alone beneficially interested in the consignment. They sold the goods for him, and accounted to him for the proceeds. Upon him, alone, therefore, ought the demand for freight to have been made. This is entirely different from the case of *Cock* v. *Taylor*, 13 *East*, 399., where the goods were delivered out of the ship to the assignee of the bill of lading. Here there is no privity between the parties to the action, and no consideration for any implied promise to pay freight. The plaintiffs had no lien on the goods after they were landed and lodged in the warehouses of the Dock Company. There was an obvious and well known mode in which they might have preserved their lien, viz. by landing the goods in the name of the captain, and putting *a stop* upon them till the freight was paid. By permitting the goods to be landed according to the manifest, they waived their lien, and could only resort to those who could be considered as having entered into an express contract to pay the freight. If the defendants were liable, a claim for freight might as well be set up against the grocer who purchased the goods from the docks, or the consumers to whom they were ultimately delivered. 2dly. But supposing that the defendants were once liable, it would be extremely unjust to call upon them for the freight after they had paid over the whole of the proceeds of the goods to their principal. If they were to be looked to, a demand ought to have been made upon them at the end of two

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two months from the delivery of the ſhip, the uſual time for freight to be paid according to the uſage of the port of London. No ſuch demand being made upon them, the defendants were naturally led to believe that the freight had been paid by ſome other perſon.——

Mr. Noble, one of the Special Jury.—They ought to have enquired whether the freight was paid before paying over the proceeds of the goods.

MANSFIELD, C. J.—To be ſure they ought.

Shepherd, Serjt.—They were deceived by the laches of the plaintiffs. No application for freight having been made to them till May 1810, they muſt be conſidered as having authority to pay the proceeds to *Fletcher*, and they were in the ſituation of agents, who without notice have paid over a ſum of money to their principal.

MANSFIELD, C. J.—I think there is no defence to this action. The defendants, as indorſees of the bill of lading, ſtand in the ſame ſituation as the conſignees; the property was in them. I ſee no difference between the indorſee of a bill of lading and the conſignee—there is no difference at all. The party who takes the goods under a bill of lading, by which they are made deliverable on payment of freight, muſt pay the freight accordingly. It does not ſignify that the proceeds were paid over before a demand of the freight was made. The defendants became owners of the goods by the indorſement of the bill of lading;

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they took the goods as indorſees of the bill of lading. I care not whether in general they are brokers or not. In this inſtance they were legal owers of the goods at the time of the landing, the bill of lading having been indorſed to them for a valuable conſideration; they were not mere agents, the property was veſted in them; if they have not reſerved the freight from the amount of the proceeds, it is their own fault. They had notice by the bill of lading that the freight was to be paid by the perſons who received the goods; they were therefore bound to ſee to the payment of the freight, and are ſtill liable for it. This is wholly unlike a claim for freight on the ſubſequent purchaſer of the goods. He received them long after they were landed by an order from the defendants, in which freight was not mentioned. The defendants received them when landed under the bill of lading, ſigned by the maſter of the ſhip, by which they were deliverable to the ſhipper or his aſſigns, on payment of freight as per charter party, with primage and average accuſtomed.

The plaintiffs had a verdict for £911. the rate of freight ſpecified in the charter party.

A rule to ſhew cauſe why there ſhould not be a new trial was granted in Hilary Term, but diſcharged in Eaſter Term; Gibbs, C. J. and the reſt of the Court being of opinion that the caſe came within the authority of Cock *v.* Taylor (*a*).

Lens,

(*a*) But in Moorſom v. Kymer, H. T. 1814, the Court of K. B held, that where there is a charter party under ſeal, providing for payment of freight by the freighter, and the goods are

1813.

BELL and Another v. KYMER and Others.

Lens, *Best*, Serjts., and *Courtenay* for the plaintiffs.

Shepherd, Serjt. S. G. and *Puller* for the defendants.

[Attornies, *Kaye* and *Crotcher*.]

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are received under an indorsed bill of lading, by which they are deliverable to the freighter or his assigns, he or they paying freight as per charter party, there is no implied promise on the part of the indorsee of the bill of lading to pay freight to the owner of the ship.

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1. An action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order. *Beaurain* v. *Sir Wm. Scott*, 388
2. An action on the case may be maintained against an incorporated waterworks Company, where workmen employed by persons who contract with the Company to lay down pipes for conducting water through a public street do the work in a negligent manner, whereby an individual passing along the street receives an injury. *Matthews* v. *West London Waterworks Company*, 403
3. A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, and pays the freight for them, may maintain an action in his own name for not delivering them according to the bill of lading. *Joseph* v. *Knox*, 320
4. In an action against an attorney for goods sold, the plaintiff proved that he filed his bill at half past eleven in the forenoon of 24th Dec. and the defendant gave in evidence a receipt for the sum demanded, dated the same day.—*Held*, that this was no answer to the action, without proof that the payment was made before the filing of the bill. *Godard* v. *Benjamin*, 331
5. It is universally the duty of the occupier of a house having an area fronting a public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the

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A man being embarraſſed in his circumſtances, all his creditors ſign an agreement to give him time for the payment of their reſpective demands by inſtalments, and to take his promiſſory notes for the amount.—This agreement is binding upon each of them, the ſigning of the others being a ſufficient conſideration, and they cannot ſue for their original cauſe of action, without proving that the agreement has been broken on the part of the debtor. *Boothbey* v. *Sowden*, 175

ALIEN ENEMY.

1. In an action on a policy of inſurance it is no defence under the general iſſue, that the perſons intereſted, who were neutrals when the policy was effected and the loſs happened, had become alien enemies before action brought. *Harman* v. *Kingston*, 152
2. Where to a plea of alien enemy the plaintiff replied that ſhe was reſident in this kingdom by the licence and permiſſion of our lord the king,—*held*, that it was not enough to prove that a licence was granted to her under 38 Geo. 3. c. 77. which expired with that ſtatute; and that ſhe has ſince continued to reſide openly in this country without moleſtation. *Alciator* v. *Smith*, 245
3. To prove that a perſon was an alien enemy at the time of action brought, it is not enough to ſhew that he was ſome time before domiciled in a territory which has become hoſtile, without ſhewing that he was a native of that territory. *Harman* v. *Kingſton*, 153

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APPRENTICESHIP.

1. An indenture of apprenticeſhip is not void by 8 Ann. c. 9. although it was originally agreed between the maſter and apprentice's father, that a premium of 20l. ſhould be paid, and the maſter afterwards, to reduce the amount of the duty, agrees to take 19l. 19s. 6d. which is the ſum inſerted in the indenture, and actually paid. *Shepherd* v. *Hall*, 180
2. In an action on 5 Eliz. c. 4. for ſetting on work one who has not ſerved an apprenticeſhip of ſeven years, the defendant is not liable, unleſs he knew that the perſon ſet on work had not ſerved an apprenticeſhip; but the Jury may infer that he knew this from his having had the means of knowledge. *Holden q. t.* v. *Lawrie* 188
3. An action on 5 Eliz. c. 4. § 31. for ſetting to work a perſon who has not ſerved an apprenticeſhip, cannot be maintained, unleſs the unqualified perſon has worked by the defendant's orders one entire month in the county in which the venue is laid.—Nor is it enough that the defendant gave him orders in this county to work, and that he accordingly did work at the buſineſs above a month in another county. *Cunningham q. t.* v. *Watſon*, 249
4. An indictment cannot be maintained on 5 Eliz. c. 4. for exerciſing a trade without having ſerved an apprenticeſhip,

ſhip, unleſs the defendant is proved to have exerciſed the trade for the ſpace of a month. *Rex* v. *Barnett*, 344

5. It is an offence againſt 5 Eliz, c. 4. § 31. to employ an unqualified perſon in any ſubſtantive part of a trade within the ſtatute, although he is incapable of doing the more difficult parts of the buſineſs, and never finiſhes any one article. *Pratt q. t.* v. *Fraſer*, 14

6. If a particular trade was carried on in 5 Eliz. it is within the proviſions of the above ſtatute, although the mode of carrying it on has been materially altered. *Pratt q. t.* v. *Fraſer*, 14

7. A perſon merely employed as *out door man* to nail on horſes-ſhoes made by others, is not ſet on work in the trade of a *farrier* within the meaning of 5 Eliz. c. 4. *Hudſon* v. *Field*, 15 *n.*

8. A trade is not within 5 Eliz. c. 4. although ſeveral of its intermediate operations were known and practiſed in England when the act paſſed, if its ultimate object be a machine or manufacture ſubſequently introduced or invented. *Martins* v. *Galloway*, 121

9. In an action on 5 Eliz. c. 4. for ſetting to work in a trade a perſon who had not ſerved an apprenticeſhip, if the trade is not enumerated in the ſtatute, ſome evidence muſt be given that it was known and practiſed in England when the act paſſed. *Martins q. t.* v. *Galloway*, 121

10. Q. as to proper title of ſtat. 5 Eliz. c. 4. which is ſtated differently in different editions of the ſtatutes? Where it was ſet out in an indictment as given by Ruffhead, the judge refuſed to direct an acquittal for a variance, on production of a copy of the act printed by the King's printer, in which it is given differently. *Rex* v. *Barnett*, 344

AREA.

See ACTION, 5.

ARREST, MALICIOUS

A. by miſtake ſues out a bailable writ againſt *B.*, and gives it to *C.*, an officer, to be executed.—*C.* ſays to *B.* he has a writ againſt him, but *B.* denying that he owed the money, *C.* does not take him into actual cuſtody. On inquiry, the miſtake is diſcovered, and *B.* is told he need give himſelf no farther trouble in the matter. However, he afterwards puts in bail above, and incurs an expence of 14l.—*Held*, that he could not maintain an action againſt *A.* for a malicious arreſt. *Bieten* v. *Burridge*, 139

ARTICLES.

See SEAMEN'S WAGES, 2.

ASSIGNEE OF BANKRUPT.

See ASSIGNEE OF LEASE, 2. AUCTIONEER, 2. BANKRUPT.

ASSIGNEE OF LEASE.

1. *A.* being aſſignee of a leaſe, puts it up to auction: *B.* becomes the purchaſer, pays a depoſit, and orders an aſſignment to him to be prepared by *A.*'s ſolicitor;—which is accordingly prepared and executed by *A.*: but inſtead of being delivered to *B.* it remains in the poſſeſſion of the ſolicitor, who claims a lien for the expence of preparing it. *Held*, that to an action againſt *A.* as aſſignee of the term for rent accruing due after he had executed the aſſignment, theſe facts were ſufficient to ſupport a plea, that before the rent became due, he had aſſigned to *B.* *Odell* v. *Wake*, 394

2. The aſſignees of a bankrupt having allowed his effects to remain upon the

premiſes occupied by him nearly a twelvemonth after the bankruptcy, for the purpoſe of preventing a diſtreſs, paid the arrears of rent due, at the ſame time intimating to the landlord that they did not mean to take to the leaſe, unleſs it could be advantageouſly diſpoſed of: the effects were ſoon after ſold and removed from the premiſes: the leaſe was at the ſame time put up to ſale by order of the aſſignees; but there were no bidders for it: they omitted to return the key to the landlord for near four months afterwards: however, they were not aſked for it, and they no otherwiſe made uſe of the premiſes.—*Held*, that they were not, under theſe circumſtances, liable to the landlord as aſſignees of the leaſe. *Wheeler* v. *Bramah*, 340

ASSUMPSIT INDEBITATUS.

See MONEY HAD AND RECEIVED.

1. Under a general count in indebitatus aſſumpſit for *work, labour, and materials*, the plaintiff may recover for attendances as a farrier and for medicines adminiſtered in the cure of the defendant's horſes. *Clark* v. *Mumford*, 37

2. Where goods were ſold "to be paid for by *E.*'s bill on *P.* without recourſe on the buyer in caſe of its not being paid," although the buyer then knew the bill to be worth nothing, he is not liable to an action of indebitatus aſſumpſit for the value of the goods. *Read* v. *Hutchinſon*, 352

ATTESTING WITNESS.

See WITNESS, 6.

1. A perſon who ſees an inſtrument executed, but is not deſired by the parties to atteſt it, cannot, by afterwards putting his name to it, prove it as an atteſting witneſs. *M'Crae* v. *Gentry*, 232

2. Where an atteſting witneſs becomes inſane, the inſtrument may be proved by evidence of his hand-writing. *Currie* v. *Child*, 283

ATTORNEY.

See ACTION, 4. BANKRUPT, 1. EVIDENCE, 9.

An attorney employed to purchaſe and prepare the aſſignment of an annuity before the deciſions holding that the truſts in the annuity deeds muſt be particularly ſet forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchaſed was void, becauſe the memorial omitted particularly to ſpecify the truſts of the annuity deeds. *Baikie* v. *Chandleſs*, 17

AVERAGE GENERAL.

1. An action at law may be maintained to recover a contribution in the nature of general average by one ſhipper of goods againſt another. *Dobſon* v. *Wilſon*, 480

2. Where the maſter of a ſhip in a foreign port was arreſted by proceſs out of a court of juſtice, at the ſuit of the agent of the ſhip, for ſums of money the latter had diſburſed on her account, and the maſter not being able to raiſe money by any other means, that he might procure his liberation, and purſue the voyage, ſold a part of the cargo.—*Held*, that the owner of the goods ſo ſold had no right to a contribution in the nature of general average from the ſhippers of the other goods on board which arrived ſafely at the port of deſtination. *Dobſon* v. *Wilſon*. 480

AUCTIONEER.

See SALE, 7.

1. If an auctioneer employed to ſell an eſtate is guilty of negligence, whereby the ſale becomes nugatory, he is not entitled to recover any compenſation for his ſervices from the vendor. *Denew* v. *Daverell*, 451

2. A trader ſends goods to an auctioneer to be ſold, and then goes to priſon, where he lies above two months. Within this time the auctioneer, not knowing of the trader being in priſon, ſells the goods, and accounts with him for the proceeds. At the end of two months a commiſſion of bankrupt is ſued out againſt the trader.—*Held* that his aſſignees could not maintain trover for the goods againſt the auctioneer, and that the payment of the money to the trader under theſe circumſtances was protected by 1 Jac. 1. c. 15. *Coles* v. *Robins*, 183

AWARD.

See HIGHWAY, 1. INTEREST, 1.

BAIL BOND.

See BOND, 2. WITNESS, 6.

BANKERS.

See BILLS OF EXCHANGE. CHEQUE. USURY, 2.

1. A change of partners in a banking-houſe is ſufficiently notified to the cuſtomers of the houſe, by a change in the printed cheques. *Barfoot* v. *Goodall*, 147

2. Where bankers diſcount a bill of exchange for a cuſtomer, giving him credit for the amount of the bill, and debiting him with the diſcount, the bill becomes the property of the bankers; and upon their bankruptcy, their aſſignees may maintain an action upon it, although there be no balance due to them from the cuſtomer. *Carſtairs* v. *Bates*, 301

BANKRUPT.

See ASSIGNEE OF LEASE, 2. AUCTIONEER, 2. INDICTMENT, 12.

1. An attorney cannot be made a bankrupt as a money ſcrivener, unleſs he has been in the habit of having money depoſited with him for the purpoſe of laying it out on ſecurities. *Adams* v. *Malkin*, 534

2. If a fiſherman buys fiſh at ſea from other boats for the purpoſe of making up his cargo, which he carries aſhore and ſells, he is a trader within the meaning of the bankrupt laws; and if ſuch be the uſual practice of a particular claſs of fiſhermen, one of them who is proved to have once done ſo, will be preſumed to have continued to carry on his buſineſs in the ſame manner. *Heanny* v. *Birch*, 233

3. Where a trader departs from his dwelling-houſe on account of domeſtic diſſentions, if he makes no arrangements for carrying on his buſineſs in his abſence, and he foreſees that as a neceſſary conſequence, his eſtabliſhment muſt be broken up, and his creditors muſt be delayed, which events accordingly happen; he thereby commits an act of bankruptcy. *Holroyd* v. *Whitehead*, 530

4. A trader who is denied by his own orders to a creditor in the habit of calling upon him to demand a debt when he is at dinner, does not commit an act of bankruptcy, if his intent be to avoid interruption at that hour, and not to delay the creditor, although the creditor be thereby delayed. *Smith* v. *Currie*, 549

5. Where there were two partners, one of whom reſided in Mancheſter and the other in London, and the London partner having left his own home without intent to delay his creditors, and having been a few days on a viſit at Mancheſter, both of them left the houſe of buſineſs there to avoid an arreſt, at the ſame time carrying their

books of account along with them.—*Held*, that they both thereby committed an act of bankruptcy. *Spencer* v. *Billing*, 312

6. Notwithstanding the order of the Lord Chancellor that commissions of bankrupt shall be sued out against parties by their real names, if a commission issues against a man by a wrong name, under which he obtains his certificate;—while the commission remains unsuperseded, a plea of bankruptcy to an action brought against him by his right name, will be supported by production of the certificate, and proof that he is really the person against whom the commission issued. *Stevens* v. *Elizee*. 256

7. If a commission of bankrupt has passed the great seal, although it never be opened or acted upon, it has *issued* within the meaning of 49 Geo. 3. c. 121. s. 2. so as to be notice of a prior act of bankruptcy, and to deprive any party who has received payments from the bankrupt after an act of bankruptcy, and more than two months before the suing forth of the effective commission, of the benefit of 46 Geo. 3. c. 135. s. 2. *Watkins* v. *Maund*, 308

8. The assignees under a joint commission against *A.* and *B.* in suing on a separate contract entered into with *A.* may describe themselves generally as the assignees of *A.* without noticing the name of *B.* *Stonehouse* v. *De Silva*, 399

9. To render the proceedings under a commission of bankrupt evidence pursuant to Sir Samuel Romilly's act, it is enough to shew that they are produced from the custody of the solicitor to the commission, or to prove the hand-writing of one of the commissioners before whom they were taken. *Collinson* v. *Hilkar*, 30

10. In an action of trespass brought by a bankrupt against his assignees to try the validity of the commission, although they are not named as assignees on the record, if he does not give any notice under Sir S. Romilly's act, 49 G. 3. c. 121. s. 10. the commission and the proceedings under it are sufficient evidence to prove the trading, act of bankruptcy, and petitioning creditor's debt. *Simmonds* v. *Knight*, 251

11. In an action by a bankrupt against his assignee to try the validity of the commission, if there be no notice under Sir S. Romilly's act, the proceedings are only primâ facie evidence for the defendant, and the plaintiff may call witnesses to contradict the depositions respecting the trading, petitioning creditor's debt, or act of bankruptcy. *Ellis* v. *Shirley*, 424

12. To prove the allowance of a bankrupt's certificate by the Lord Chancellor, the book kept in the office of the secretary of bankrupts, in which entries are made of the allowance of certificates, is not secondary evidence. *Henry* v. *Leigh*, 499

13. To prove that the defendant who pleads his bankruptcy had been before discharged as a bankrupt,—after notice to produce the former certificate, it is enough if witnesses state they were employed by him to solicit that certificate, and that looking at the entries in their books they have no doubt it was allowed by the Lord Chancellor. *Henry* v. *Leigh*, 499

14. Where two partners have stopped payment, and a commission of bankrupt is taken out against one of them, a debtor to the firm who knows of the stoppage cannot refuse to pay money due to them, on the ground that the other may have committed an act of bankruptcy, in which case his assignees might call upon the debtor to pay a moiety of the money a second time. *Prickett* v. *Down*, 131

15. In an action for maliciously suing out a commission of bankrupt to sustain an allegation, that the commission was duly superseded, it is not enough to prove an order by the Lord Chancellor directing it to be superseded. *Poynton* v. *Forster*, 60

16. Stat. 19 Geo. 2. c. 32. only protects payments in respect of bills of exchange after a secret act of bankruptcy, where the bankrupt was liable on the bills to the party receiving the money. *Holroyd* v. *Whitehead*, 530

BARON AND FEME.

See COVERTURE.

1. If wearing-apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods, and in an action against him for their value, is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter. *Metcalfe* v. *Shaw*, 12.

2. Under a plea of the general issue to an action of assumpsit against husband and wife for goods sold to the wife before the marriage, it is competent to prove that she was then married to another husband who is still alive. *Cowley* v. *Robertson*, 438

3. If a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. *Shepherd* v. *Mackoul*, 326

4. Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence;—*held*, that he was liable to an attorney, whom she employed to defend her, and by whom he knew that she was defended. *Shepherd* v. *Mackoul*, 326

BASTARD.

1. A woman tried on the coroner's inquest for the murder of her bastard child, may be found guilty under 43 G. 3. c. 58. s. 4. of endeavouring to conceal the birth. *Rex* v. *Mary Cole*, 371

BILL OF LADING.

1. By a bill of lading, goods are deliverable to *J. S.* if he should accept and pay a bill of exchange;—if not, to the holder of the said bill of exchange.—*J. S.* accepts the bill of exchange, and indorses the bill of lading for a valuable consideration; but does not pay the bill of exchange when due.—*Held*, that upon its dishonour, the property of the goods vested in the holder of it, and that he might maintain trover for the goods against the indorsee of the bill of lading. *Barrow* v. *Coles*, 92

2. Merchants in London receive from a mere stranger residing abroad a bill of lading of certain goods in a letter requesting them to effect insurance. They declining to do business for the consignor, but acting bonâ fide with a view to his interest, indorse the bill of lading to a friend of his, who receives the goods, and afterwards fails with the proceeds in his hands.—*Held*, that the merchants by indorsing the bill of lading were liable to the consignor for the amount. *Corlett* v. *Gordon*, 472

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BANKERS, 2. INTEREST, 4., 5. USURY, 2.

1. Where the drawer of a bill of exchange makes it payable at a particular place, this is part of the contract, and must be mentioned in describing the bill in the declaration. *Hodge* v. *Fillis*, 463

2. Where a bill of exchange is drawn payable in London, and it is accepted payable at a London banker's, in an action againſt the acceptor, a preſentment for payment there is a material averment, and muſt be proved at the trial. *Hodge* v. *Fillis*, 463
3. If a promiſſory note is made payable at a particular place, it is a fatal variance to omit to ſtate this in declaring on the note. *Roche* v. *Campbell*, 247
4. An action may be maintained here by a neutral on promiſſory notes given to him by a Britiſh ſubject in an enemy's country for goods ſold there. *Houriet* v. *Morris*, 303
5. Where the drawee of a bill of exchange who had once refuſed to accept it, ſaid to the holder, "if you will ſend it to the counting-houſe again, I will give directions for its being accepted."—*Held* that he was not liable as acceptor, without evidence that the bill was again ſent back to his counting-houſe for acceptance. *Anderſon* v. *Pitck*, 179
6. Although a bill of exchange cannot be re-iſſued after it has arrived at maturity and been once paid, yet if it is paid and afterwards indorſed before it becomes due, it is a valid ſecurity in the hands of a bonâ fide indorſee. *Burbridge* v. *Manners*, 194
7. Notice of the diſhonour of a bill of exchange or promiſſory note, may be given the ſame day it becomes due, as ſoon as the acceptor or maker has refuſed payment. *Burbridge* v. *Manners*, 193
8. Where a bill is drawn upon funds which there is reaſonable ground to expect will reach the hands of the drawee before it becomes due; although they do not, the drawer is entitled to notice of its diſhonour. *Robins* v. *Gibſon*, 334
9. If the drawer of a bill of exchange has reaſonable ground to expect that it will be honored on the ſtrength of a conſignment, he is entitled to notice of its diſhonour, although no effects ever get into the hands of the drawee to pay it. *Rucker* v. *Hiller*, 217
10. The drawer of a bill of exchange is entitled to due notice of its diſhonour if he had any effects in the hands of the drawee at any time between the drawing of the bill and its becoming due. *Hammond* v. *Dufrene*, 145
11. The drawer of two bills of exchange, before they became due received notice that they were accidentally deſtroyed, and was called upon to give others in their ſtead, according to the ſtatute 9 & 10 W. 3. c. 17.—When the bills were drawn, he had no effects in the hands of the acceptors; but before either was due, the acceptors were indebted to him to an amount leſs than one of the bills, and became bankrupt. *Held*, that he was nevertheleſs entitled to notice of the diſhonour of both bills. *Thackray* v. *Blackett*, 164
12. A few days before a bill of exchange becomes due, the acceptor informs the drawer, he will be unable to pay it, ſays the drawer muſt take it up, and gives him part of the amount to aſſiſt him in doing ſo: The drawer receives the money, and promiſes to take up the bill accordingly.—*Held*, that in an action by the indorſee againſt the drawer, the latter might nevertheleſs ſet up as a defence, that the bill was not duly preſented for payment, and that he had not regular notice of its diſhonour; but that the ſum paid him by the acceptor, was money had and received to the plaintiff's uſe. *Baker* v. *Birch*, 107
13. Where the drawer of a foreign bill of exchange happens to be in England when it becomes due and is diſhonoured, it is enough for the purpoſe of charging him, to have the bail

bill proteſted, and to give him notice of the fact of its diſhonour, without communicating the proteſt to him, or ſending a copy of it to the place where the bill was drawn. *Robins* v. *Gibſon*, 334

14. To excuſe the not giving of regular notice of the diſhonour of a bill of exchange to the indorſer, it is not enough to ſhew that the holder, being ignorant of his reſidence, made inquiries upon the ſubject at the place where the bill is payable. *Beveridge* v. *Burgis*, 262

15. In an action againſt the maker of a promiſſory note payable at a banking-houſe, it is not neceſſary to prove that he had notice of its diſhonour. *Pearſe* v. *Pemberthy*, 261

16. The drawer of an accommodation bill is not diſcharged by time being given to the acceptor. *Collott* v. *Haigh*, 281

17. Where, upon an accommodation bill becoming due, it was preſented for payment to the acceptor, and he promiſed to pay it;—*held*, that he was not diſcharged by time being afterwards given, without his conſent, to the drawer by the indorſee, who knew that it had been accepted for the drawer's accommodation. *Kerriſon* v. *Cooke*, 362

18. Where ſeveral plaintiffs ſue as indorſees of a bill of exchange, if the bill appears indorſed in blank there is no neceſſity for their proving that they were in partnerſhip together, or that the bill was indorſed and delivered to them jointly. *Ord* v. *Portal*, 239

19. In an action on a promiſſory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it ſhould be renewed, and payment ſhould not be demanded when it became due. *Hoare* v. *Graham*, 57

20. The maker of a promiſſory note pays money into the hands of an agent to retire it; the agent tenders the money to the holder of the note, on condition of having it delivered up: the note being miſlaid, this condition is not complied with; and the agent afterwards becomes bankrupt with the money in his hands.—*Held*, that the maker was ſtill reſponſible on the note; but that intereſt was not recoverable after the time of the tender. *Dent* v. *Duhn*, 296

21. A traveller received a bank note in a provincial town, which he cut in two, and ſent the halves on different days by the poſt, addreſſed to his employers in London; one of theſe was ſtolen from the mail coach, and they received the other.—*Held*, that under theſe circumſtances, they could not maintain an action againſt the makers of the note on producing that half which reached them ſafely. *Mayor* v. *Johnſon*, 324

22. A bill of exchange payable to the order of the drawer, in an action by him againſt the acceptor, is good evidence under the money counts. *Thompſon* v. *Morgan*, 101

23. Where under an agreement between *A.* and *B.* for the ſale of a leaſe, B. accepts a bill for the purchaſe money, and is let into poſſeſſion of the premiſes, it is no defence to an action by *A.* againſt *B.* upon the bill, that *A.* refuſed to execute an aſſignment of the leaſe according to the agreement. *Moggridge* v. *Jones*, 38

24. Although a promiſſory note without a ſtamp cannot be received in evidence as a ſecurity, or to prove the loan of money, it may be looked at by the jury with a view to aſcertain a collateral fact. *Gregory* v. *Fraſer*, 454

25. A bill of exchange accepted by an officer in the recruiting ſervice in payment of ſmall quantities of ſpirits

under the value of 20s. ſupplied by a publican to be uſed out of his houſe by recruits and others under the command of the acceptor, is valid, notwithſtanding 24 G. 2. c. 40. ſ. 12. *Spencer* v. *Smith*, 9
But ſee *Scot* v. *Gilmore*, 3 *Taunt.* 226

BOND.

1. Where to debt on bond, conditioned for the payment of a ſum of money *on demand*, the defendant pleads that no demand was made, upon which iſſue is joined, the plaintiff muſt prove an expreſs demand before action brought. *Carter* v. *Ring*, 459
2. If a party executes a bail bond before the condition is filled up, it is void. *Powell* v. *Duff*, 181

BOOKS OF ACCOUNT.

See EVIDENCE, 13.

BROKER.

See INSURANCE BROKER.

Where colonial produce is ſold through the intervention of a broker; by the uſage of trade in London, (which was held to be valid,) he is entitled in all inſtances (if there be no expreſs ſtipulation to the contrary) to ½ per cent. commiſſion from the purchaſer, as well as from the ſeller. *Eicke* v. *Meyer*, 412

BUST.

1. It is no offence under 38 G. 3. c. 71. paſſed for preventing the pirating of buſts and other figures made and publiſhed by ſtatuaries, to *ſell* a pirated caſt of a buſt, if the piracy has any addition to or diminution from the original; and it appears to be no offence to *make* a pirated caſt, if it is a perfect fac-ſimile of the original. *Gahagan* v. *Cooper*, 111
2. If a perſon who is not a modeller or ſtatuary *expoſes to ſale* a pirated buſt, this is not preſumptive evidence of his having *made* it. *Gahagan* v. *Cooper*, 115

CARRIER.

1. A notice by carriers that they will not be anſwerable for any goods above the value of 5l. unleſs the value be declared, and a premium paid above the common carriage, does not apply to goods which, from their bulk and appearance, muſt be known to exceed the ſpecified value. *Beck* v. *Evans*, 267
2. If a carrier receives goods at a diſtance from his office,—to be diſcharged from his common law liability, he muſt prove that the ſpecial terms on which he deals were communicated to the owner of the goods through ſome other medium than a notice ſtuck up in the office; and *that* to be of any avail muſt be in ſuch large characters that a perſon delivering goods at the office cannot fail to read it without groſs negligence. *Clayton* v. *Hunt*, 27
3. Nothwithſtanding a notice by carriers that they will not be accountable for goods of a particular deſcription, above the value of 5l. "unleſs ſpecified and paid for as ſuch when delivered;"—*held* that they were liable for damage done to an article of this deſcription, much above the value of 5l. although not *paid for as ſuch when delivered*, their book-keeper having been then informed of its value, and deſired to charge for it what he pleaſed, which ſhould be paid, provided it was taken care of. *Wilſon* v. *Freeman*, 527

CASE.

See ACTION. PLEADING, 2.

CERTI-

CERTIFICATE OF BANKRUPT.

See BANKRUPT, 6, 12, 13.

CERTIFICATE FOR COSTS.

See FALSE IMPRISONMENT, 3. PRACTICE, 4.

CHARTER-PARTY.

See SHIP, 3, 5, 6, 10, 14.

CHEQUE.

See INDICTMENT, 1.

If a cheque is given on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to ſtop the payment of the cheque. *Wienholt* v. *Spitta*, 376

COMPOSITION.

See AGREEMENT.

CONSTABLE.

A member of the Barbers Company in the City of London, is not exempted from ſerving the office of conſtable. *Rex* v. *Chapple*, 91

CONVEYANCE.

Where a ſtatute points out the particular manner in which a canal company ſhall ſell and convey lands, and enacts that every ſuch ſale and conveyance ſhall be valid and effectual to all intents and purpoſes, this does not cure any defect in the title to lands ſo ſold and conveyed by the company. *Ward* v. *Scott*, 284

CONVOY ACT.

See INSURANCE, 18, 29.

CORPORATION.

See ACTION, 2.

COVENANT.

See SHIP, 3, 6.

1. A covenant in the leaſe of a houſe, "to inſure and keep inſured a given ſum of money upon the premiſes during the term in ſome ſufficient Inſurance Office," is not void for uncertainty; but means, that the premiſes ſhall be inſured againſt fire in ſome office where inſurances againſt fire are uſually effected. *Doe d. Pitt* v. *Shewin*, 134

2. Where there was ſuch covenant in a leaſe on the part of the tenant, he effected an annual policy on the premiſes with an Inſurance Company in the uſual printed form, by which it is declared that the policy ſhall be for ſuch longer period as the tenant ſhall regularly pay, and the Company receive the premium, and a ſpace of 15 days beyond the quarter day is given for payment of the premium, during which time the Company is liable: The year expired on the 25th of March 1811; but the tenant did not pay the premium for a renewal till the 25th of April following: The Company then gave a receipt for the premium, ſtating the inſurance to be from Lady-day 1811 to Lady-day 1812.—*Held*, that the covenant was broken by reaſon of the non-payment of the premium on or before the 9th of April, and that the leaſe was forfeited upon a clauſe of re-entry. *Id.*

COVERTURE.

See BARON AND FEME.

1. To ſupport a defence to an action of aſſumpſit, that the plaintiff was under coverture when the cauſe of action accrued, although ſhe lived as a ſingle woman,—it is not enough to prove a bare declaration by her that ſhe had been married to *J. S.* who was ſtill alive, without actual proof of the marriage, or of cohabitation with her ſuppoſed

ſuppoſed huſband; particularly if there appear any reaſon to doubt that the marriage was valid. *Wilſon* v. *Mitchell*, 393

2. A woman by birth an alien, and the wife of an alien, cannot be ſued as a feme ſole, if her huſband has lived with her in this country, although he has left her here and entered into the ſervice of a foreign ſtate. *Kay* v. *Ducheſſe de Pienne*, 123

CROSS ACTION.

See MONEY HAD AND RECEIVED, 1.

DISTRESS.

If the occupier of a houſe ſubmits to a diſtreſs for rent ſtated in the notice of diſtreſs to be due from him as tenant to the diſtrainer, this is an acknowledgment of the tenancy. *Panton* v. *Jones*, 372

DOUBLE VALUE.

See NOTICE TO QUIT, 2.

ECCLESIASTICAL COURT.

See ACTION, 1. EVIDENCE, 15.

EJECTMENT.

See WITNESS, 3.

1. In ejectment, where the defendant comes in as landlord, it is neceſſary to ſhew that he is in the receipt of the rents and profits of the premiſes to which the leſſor of the plaintiff makes title, or that the declaration in ejectment was ſerved upon the tenant in poſſeſſion of theſe premiſes. *Fenn d. Phillips* v. *Cook*, 512

2. In ejectment, where the defendant comes in as landlord, to connect him with the premiſes to which the leſſor of the plaintiff makes title, it is enough to ſhew that the declaration in ejectment was ſerved upon the tenant in poſſeſſion of theſe premiſes. *Doe d. Schoſield* v. *Alexander*, 516

3. In ejectment on the ſeveral demiſes of three perſons, each demiſe being of the whole, the leſſors of the plaintiff are entitled to a verdict, upon evidence that they jointly granted a leaſe to the defendant which has expired. *Doe d. Lulham* v. *Fenn*, 190

4. In ejectment by an executor, it is ſufficient prima facie evidence that the teſtator had a chattel intereſt in the premiſes, to put in the defendant's anſwer to a bill in equity ſtating that "*he believed the teſtator was poſſeſſed of the leaſehold premiſes in the bill mentioned.*" *Doe d. Digby* v. *Steel*, 115

5. In ejectment upon the aſſignment of a term to ſecure an annuity, a proper memorial of the annuity deeds will be preſumed till the contrary is ſhewn. *Doe d. Griffin* v. *Maſon*. 7

ESCAPE.

See SHERIFF, 5.

EVIDENCE.

See BANKRUPT, 9, 10, 11, 12, 13, 15. INSOLVENT DEBTORS ACT, 1.

1. Copy of ſentence of condemnation, not evidence, though handed over by aſſured to underwriters. *Flindt* v. *Atkins*, 215, *n.*

2. Where to an action againſt executors on the bond of their teſtator, they plead *non eſt factum*, and ſet up lunacy as a defence at the trial, an inquiſition taken under a commiſſion of lunacy againſt the teſtator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admiſſible evidence. *Faulder* v. *Silk*, 126.

3. On a trial at law, an examined copy of the plaintiff's anſwer to a bill in equity may be read in evidence againſt him,

him, without producing the original. *Hodgkinſon* v. *Willis*, 401
4. In an action for diſturbing plaintiff's enjoyment of a pew claimed in right of a meſſuage, an old entry in the book, ſigned by the churchwardens, ſtating that the pew had been repaired by the then owner of the meſſuage (under whom the plaintiff claims), in conſideration of his uſing it, is admiſſible evidence to prove plaintiff's right to the pew. *Price* v. *Littlewood*, 288.
5. In an action by the maſter of a ſhip for freight, the declarations of the owner for whoſe benefit the action is brought, are evidence for the defendant. *Smith* v. *Lyon*, 465
6. Where the defendants had acknowledged they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial;—*held*, that an entry by a deceaſed clerk of the plaintiff in a letter book, profeſſing to be a letter of the ſame date from the plaintiff to the defendants, was admiſſible evidence of the contents of the letter, on proof that according to the plaintiff's courſe of buſineſs the letters which he wrote were copied by this clerk, and then ſent off by the poſt, and that in other inſtances the copies ſo made by the clerk had been compared with the originals, and always found correct. *Pritt* v. *Fairclough*, 305
7. Entry of the deceaſed clerk of a merchant in the letter book, received in evidence, on proof that it was made in the uſual courſe of buſineſs in the merchant's counting-houſe, *Hagedorn* v. *Reid*, 379
8. If there be one invariable mode in which bills of exchange are drawn between particular parties, this may be proved by parol evidence, without any of the bills being produced. *Spencer* v. *Billing*, 310
9. In an action againſt an attorney for negligence in reſpect to the memorial of an annuity which he had prepared and carried in to be inrolled, an examined copy of the roll is prima facie evidence of the original memorial. *Baikie* v. *Chandleſs*, 20
10. To render the certified copy of the affidavit made by the proprietor of a newſpaper evidence under 38 Geo. 3. c. 78. it muſt either appear upon the *jurat* that the perſon before whom it was made, had authority to take it, or this fact muſt be proved *aliunde*. *Rex* v. *White*, 99
11. But it is ſufficient evidence of publication at common law, to put in the original affidavit of the proprietor, ſtating where the paper was to be publiſhed, and to prove that a paper with a correſponding title containing the libel was purchaſed there. *Rex* v. *White*, 100
12. In an action on 14 Geo. 3. c. 49. by the treaſurer of the College of Phyſicians, to prove his right to ſue in that capacity, it is enough to put in the annals of the Comitia Majora recording his appointment, and to ſhew that he afterwards acted as treaſurer, without calling any one who was preſent at the election. *Budd* v. *Foulks*, 405
13. If upon a notice to produce books of account, they are not produced, this circumſtance affords no legal ground for any inference reſpecting their contents, and merely entitles the oppoſite party to prove their contents by parol evidence. *Cooper* v. *Gibbons*, 363
14. The duplicate of a writing taken from the autograph at one impreſſion, by means of a copying machine, cannot be read in evidence as an original. *Nodin* v. *Murray*, 228
15. The practice of the eccleſiaſtical court is matter of fact to be proved by evidence, and left to the jury. *Bedtrain* v. *Scott*, 388

EXECUTORS.

See EJECTMENT, 4. SHIP, 13.

If executors neglect to give orders for the funeral of the teſtator, and have ſufficient aſſets for that purpoſe, they are liable, upon an implied promiſe, to the perſon who furniſhes the funeral in a manner ſuitable to the teſtator's degree and circumſtances. *Tugwell* v. *Heyman*, 298

FACTOR.

See BROKER.

Where a factor upon ſelling goods takes a ſecurity payable to himſelf from the purchaſer, and gives his own ſecurity to the principal for the net proceeds, without diſcloſing the name of the purchaſer; if the latter becomes inſolvent before paying his ſecurity, the factor cannot compel the principal to refund the money received by him as the price of the goods. *Simpſon* v. *Swan*, 291

FALSE IMPRISONMENT.

See TRESPASS.

1. The keeper of a priſon who receives and detains one apprehended and charged in his cuſtody under a warrant, runs the riſk of the warrant having been executed againſt the proper perſon; and though acting *bonâ fide*, and without the means of aſcertaining the identity of the individual named in the warrant, he is liable to an action of treſpaſs and falſe impriſonment, if by the miſtake of the officer to whom it was directed, it was executed againſt another. *Aaron* v. *Alexander*, 35

2. A peace officer may juſtify taking a perſon into cuſtody charged with a felony, although no felony was committed. The ſame rule ſtated to have been laid down by BULLER, J. with reſpect to a breach of the peace. *Hobbs* v. *Branſcomb*, 420

3. In treſpaſs and falſe impriſonment againſt ſeveral, where one acquitted, certificate granted under 8 & 9 W. 3. c. 11. to deprive him of his coſts. *Aaron* v. *Alexander*, 35

FALSE RETURN.

See SHERIFF, 4, 6, 8.

FIRE INSURANCE AGAINST.

See COVENANT, 1, 2. INSURANCE, 32.

FRAUDS, STATUTE OF.

If goods are ordered verbally, the delivery of them to a carrier is ſufficient to bind the contract according to the ſtatute of frauds, where the purchaſer has been in the habit of receiving goods from the vendor by the ſame mode of conveyance. *Hart* v. *Sattley*, 528

FREIGHT.

See SHIP.

GAME.

Although it may be a defence to an action for penalties on 5 Ann. c. 14. that the defendant joined in the ſport as ſervant to another, he muſt give ſtrict evidence that the perſon by whoſe orders he acted was himſelf qualified to kill game. *Clarke* v. *Broughton*, 328

GUARANTIE.

1. If *A.* become bound to *B.* under condition that *C.* ſhall truly account to *B.* for all ſums of money received by *C.* for *B.*'s uſe, and *C.* afterwards, with *B.*'s knowledge, takes *D.* as his partner; the guarantie does not extend to ſums of money received by *C.* for *B.*'s uſe, after the formation of the

the partnerſhip. *Bellairs* v. *Ellſworth*, 53

2. An undertaking to be anſwerable to a given amount *for any goods ſupplied by A. to B.*, after goods to that amount have been ſupplied and paid for, ſtill remains in force while *A.* ſupplies *B.* with goods on the ſame footing, until revoked by the ſurety. But as ſoon as *A.* alters the credit on which he ſupplied the goods to *B.* the ſurety is diſcharged. *Baſtow* v. *Bennett*, 220

3. In an action on a guarantie for the debt of a third perſon, ſigned by one of two partners in the partnerſhip firm, it is neceſſary to give ſome evidence beyond the relationſhip of partners ſubſiſting between them, that the one who ſigned had authority to bind the other by the guarantie. But for this purpoſe it would be ſufficient to prove a parol acknowledgement from the other partner ſubſequently to the giving of the guarantie, or to ſhew a previous courſe of dealing, in which ſimilar guaranties had been given in the partnerſhip firm, with the privity of both partners. *Duncan* v. *Lowndes*, 478

HIGHWAY.

See PLEADING, 4.

1. Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant is bound to repair *ratione tenuræ*, an award made under a ſubmiſſion by a former tenant for years of the premiſes can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *poſt litem motam*. *Rex* v. *Cotton*, 444

2. Although a ſtatute enacts, that the paving of a particular ſtreet ſhall be under the care of commiſſioners, and provides a fund to be applied to that purpoſe, and another ſtatute paſſed for paving the ſtreets of the pariſh, contains a clauſe that it ſhall not extend to a particular ſtreet, the inhabitants of the pariſh are not exempted from their common law liability to keep that ſtreet in repair. *Rex* v. *Inhabitants of St. George Hanover Square*, 222

HORSE.

1. In an action for not taking proper care of a hired horſe, whereby his knees were broken, the plaintiff muſt give ſome poſitive evidence of negligence; and it is not enough to prove that the animal was returned by the defendant with his knees broken, although he had often been let out to hire before without having fallen down. *Cooper* v. *Barton*, 5

2. If upon a hired horſe being taken ill, the hirer calls in a farrier, he is not anſwerable for any miſtakes which the latter may commit in the treatment of the horſe: but if inſtead of that he preſcribes for the horſe himſelf, and from unſkilfulneſs gives him a medicine which cauſes his death, although acting *bonâ fide*, he is liable to the owner of the horſe as for groſs negligence. *Dean* v. *Keate*, 4

INDEBITATUS ASSUMPSIT.

See ASSUMPSIT INDEBITATUS.

INDICTMENT.

See APPRENTICE, 4.

1. It is an indictable offence, fraudulently to obtain goods, by giving in payment a cheque upon a banker with whom the party keeps no caſh, and which he knows will not be paid. *Rex* v. *Jackſon*, 370

2. It is an indictable offence for ſtage coaches to ſtand plying for paſſengers in the public ſtreets. *Rex* v. *Croſs*, 224

3. It

3. It is an indictable offence for a timber merchant to cut logs of timber in the ſtreet adjoining his timber yard; though he ſhould not be able otherwiſe to get them into his premiſes, or to carry on his buſineſs there. *Rex* v. *Jones*, 230

4. It is not an offence within the clauſe of Lord Ellenborough's act, 43 G. 3. c. 58., againſt *maliciouſly cutting, with intent to reſiſt lawful apprehenſion*, if the cutting took place in an attempt to apprehend the priſoner previous to any notification being made to him of the purpoſe for which he was laid hold of. *Rex* v. *Ricketts*, 68

5. To ſupport an averment in an indictment for receiving ſtolen goods, that the principal felon had been duly convicted, it is ſufficient to give in evidence the examined copy of a record ſhewing that he was found guilty of the felony before a court of competent juriſdiction, however informal the proceedings may appear, and however erroneous the judgment on the felon. *Rex* v. *Baldwin*, 265

6. If during the trial of a priſoner for a capital offence, one of the jurymen is taken ill, the jury may be diſcharged and the priſoner tried by another jury. *Rex* v. *Edwards*, 207

7. An indictment againſt an acceſſary to a felony, ſtating that the felony was committed *by a perſon to the jurors unknown*, cannot be ſupported if the principal felon was a witneſs before the grand jury. *Rex* v. *Walker*, 264

8. Upon an indictment on 43 G. 3. c. 58. § 2. charging the priſoner with having adminiſtered to a woman the *decoction* of ſavin, with intent to procure abortion, it is not a material variance that the preparation of ſavin adminiſtered, is properly called an *infuſion*, not a *decoction*. *Rex* v. *Phillips*, 73

[The name of this caſe has been omitted in the report by miſtake.]

9. Upon an indictment on 43 G. 3 c. 58. § 2., charging that the priſoner adminiſtered to a woman with child but not quick with child, for the purpoſe of procuring abortion, a large quantity of a certain "mixture to the jurors unknown, then and there being a noxious and deſtructive thing," it is unneceſſary to prove that the mixture was noxious or deſtructive, or even that the woman was actually with child. *Id.* 75

10. The words "quick with child," in the firſt ſection of 43 G. 3. c. 58. are to be underſtood in their popular ſenſe, viz. when the woman has felt the child move within her. *Id.* 76

11. *Q.* Whether it be now neceſſary in an indictment for felony, to lay a pariſh within the county? *Id.* 77

12. On indictment againſt a bankrupt for perjury before the commiſſioners, what evidence neceſſary to ſupport the commiſſion. *Rex* v. *Puniſhon*, 96.

INFANCY.

If goods are delivered to a carrier by the vendor, addreſſed to the purchaſer, while the latter is under the age of 21, but they do not reach him till he has attained that age, infancy is a good defence to an action brought againſt him for the price of the goods. *Griffin* v. *Langfield*, 254

INSOLVENT DEBTORS ACT.

1. To prove that the plaintiff was diſcharged under an inſolvent act after the cauſe of action accrued and before action brought, it is not enough to give in evidence a parol acknowledgment by him; but the clerk of the peace ſhould be called, and the order of ſeſſions produced to ſhew the regularity of the diſcharge. *Scott* v. *Clare*, 236

2. In an action by the payee of a bill of exchange accepted by the defendant for a valuable conſideration, evidence that the plaintiff had been diſcharged

as an insolvent debtor after the bill became due, and had given in a blank schedule, is not enough to shew that the bill had been satisfied. *Hart* v. *Newman*, 13

INSURANCE.

See ALIEN ENEMY, 1. INSURANCE BROKER.

1. Expected profits may be insured by an open policy. *Eyre* v. *Glover*, 276
2. Insuring a ship by *an English name* does not amount to a warranty, or a representation, that she is *an English ship*. *Clapham* v. *Cologan*, 382.
3. A policy "at and from *A.* and *B.*" is not vitiated by inserting, without the consent of the underwriters, the words, "both or either." *Clapham* v. *Cologan*, 382
4. Where there is a warranty in a policy of insurance against average, "unless general, or the ship be stranded," if during the voyage the ship is forced a-shore by the wind, or is driven on a bank, and remains fast for any time, this is a sufficient stranding to do away the effect of the warranty, although the ship is not proved to have thereby received any material damage. *Harman* v. *Vaux*, 429
5. There is not an implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. Therefore, where from an omission of the captain, the goods insured on a voyage from this country to a foreign port are not mentioned in the ship's manifest as required by 13 & 14 Car. 2. c. 11. and other statutes, but the loss is not occasioned by this defect;—the underwriters are liable. *Carruthers* v. *Gray*, 142
6. Where it is stipulated by a charter party, that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage. *Hobbs* v. *Hannam*, 93
7. Where there is a policy on goods as may be thereafter declared and valued, the declaration of interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss: But the declaration of interest is not a condition precedent; and if none is made, the policy is then open instead of being valued, and upon proof of interest at the trial, the assured will be entitled to recover. *Harman* v. *Kingston*, 150
8. Where there is a policy on goods by ship or ships to be thereafter declared, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials; he may afterwards in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters, and without a fresh stamp. *Robinson* v. *Touray*, 158
9. If goods are fraudulently overvalued in a policy of insurance with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board. *Haigh* v. *De la Cour*, 319
10. Where a licence is granted for a voyage to a hostile country, to continue in force till a given day, if the voyage is *bonâ fide* begun before that day, it continues to be protected by the licence though delayed beyond the day by stress of weather or other accident over which the assured have no controul. *Groning* v. *Crockett*, 85
11. So where there is a policy "*at and from*," if the ship has her cargo on board and is ready to sail before the day when the licence expires, although she is detained in port till after the day by contrary winds, the policy remains valid. *Schroder* v. *Vaux*, 84 *n.*

12. A licence to *A. B. on behalf of himſelf and other Britiſh or neutral merchants*, to import a cargo in a veſſel bearing any flag except the French, will legalize a policy of inſurance on a ſhip belonging to an alien enemy employed for this purpoſe, if the cargo is proved to belong to *Britiſh or neutral merchants*; but not otherwiſe. *Hagedorn* v. *Reid*, 377

13. In effecting a policy of inſurance from Ruſſia to this country while the ſhip was on the outward voyage, the broker repreſented to the underwriters *that a cargo was ready for her, and ſhe was ſure to be an early ſhip.*—Held, that this amounted only to a repreſentation of what was *expected* on the part of the aſſured, and that the underwriters were liable, although from the delay in beginning to load the cargo, the voyage home was turned from a ſummer to a winter riſk. *Hulbard* v. *Glover*, 313

14. If a chartered ſhip be loſt by means of the captain engaging in an illegal trade in obedience to the orders of the charterer, this is not a loſs by barratry for which the owner of the ſhip can recover againſt the underwriters. *Hobbs* v. *Hannam*, 94

15. If goods inſured are warranted free from capture and ſeizure in the port of diſcharge, and the goods being deſtined to *Pillau* are ſeized while the ſhip is lying at anchor in *Pillau Roads*, this is a ſeizure in the port of diſcharge within the meaning of the warranty. *Maydhew* v. *Scott*, 205

16. Where goods inſured were warranted free from ſeizure in the port of diſcharge, the captain having arrived within about two miles and a half from the harbour of the place to which he was deſtined, caſt anchor and made a ſignal for a pilot; a pilot boat in conſequence came out with douaniers on board, who carried him into the harbour, where the cargo was ſeized and condemned.—*Held*, that this was a ſeizure in her port of diſcharge within the meaning of the warranty. *Oom* v. *Taylor*, 204

17. Upon a common policy on goods, the underwriters are diſcharged if the goods are landed at the port of deſtination by the officers of government there, and are lodged in the government warehouſes, if this be the uſual mode in which goods are landed at that port, although the goods inſured are afterwards confiſcated by the government, and are never in the poſſeſſion of the conſignees. *Brown* v. *Carſtairs*, 161

18. Where a ſhip was inſured *from London to Berbice*, with an extenſive liberty of touching and trading at all places; *held* that by putting into *Madeira* and ſtaying there after the convoy with which ſhe ſailed had proceeded on the voyage, ſhe was guilty of a deviation which diſcharged the underwriters.—*Semble*, that as the captain did not know when the convoy ſailed away and expected to overtake it, this was not *a deſerting of convoy* within the meaning of the convoy act. *Williams* v. *Shee*, 469

19. A policy of inſurance "at and from London to Berbice" was effected upon the receipt of a letter from the captain, (which was ſhewn to the underwriters,) ſtating that he had paſſed Barbadoes, and the words "at ſea" were inſerted in the policy after the printed clauſe deſcribing the beginning of the adventure on the goods. *Held*, notwithſtanding, that the policy was vacated by a deviation at Madeira, in a former part of the voyage. *Redman* v. *London*, 503

20. If a fire ariſes on board a ſhip from the damaged quality of goods on board which are inſured, the underwriters are not liable; but if the loſs is not occaſioned by the damaged ſtate of the goods on board, the policy

licy is not vitiated by the fact not having been diſcloſed to the underwriters that the goods were damaged, though that might have a tendency to encreaſe the riſk. *Boyd* v. *Dubois*, 133

21. Where a ſhip inſured to Martinique and all or any of the windward and leeward iſlands, landed the greateſt part of her cargo at Martinique, and ſailed with the reſidue to Antigua, where ſhe was wrecked while ſtopping partly to diſpoſe of the reſidue of the outward cargo, and partly to obtain a homeward cargo;—*held*, that the underwriters were not liable. *Inglis* v. *Vaux*, 437

22. Policy on goods "at and from the ſhip's loading port or ports in *Amelia Iſland* to London." The ſhip never touched at *Amelia Iſland*, but took in her cargo at *Tigre Iſland*, which lies a little farther up the river *St. Mary's*. *Held*, that the policy, nevertheleſs attached, this being the uſual mode in which ſhips in that trade take in their cargoes. *Mowon* v. *Atkins*, 200

23. Where there is a valued policy on freight, and the ſhip is loſt while taking in her cargo, the aſſured can only recover for the freight of the goods actually on board, unleſs a full cargo be then provided for her, or there be a contract either written or parol to ſupply one. *Patrick* v. *Eames*, 441

24. To ſupport an averment in a declaration on a policy of inſurance on goods "that the ſhip with the goods on board when at A. was arreſted by the perſons exerciſing the powers of government there, and the goods were then and there by the ſaid perſons ſeized, detained, and confiſcated," it is enough to ſhew that the goods were forcibly taken from on board the ſhip by the officers of government, and never delivered to the conſignees; —without putting in any ſentence of condemnation. *Carruthers* v. *Gray*, 142

25. If a ſhip inſured is condemned for carrying ſimulated papers contrary to the law of nations, without having any liberty in the policy to do ſo, the underwriters are diſcharged. *Horneyer* v. *Luſhington*, 85

26. Policy on goods "at and from Gottenburg to any port of the Baltic, beginning the adventure from the loading thereof," but declared to be *in continuation* of other ſpecified policies. Theſe were on the ſame goods "at and from Norfolk in Virginia," where in point of fact the goods were loaded.—Held, that under theſe circumſtances, it was no defence to the underwriters on the firſt-mentioned policy, that the goods were not loaded at Gottenburg. *Bell* v. *Hobſon*, 272

27. In an action on a policy of inſurance on a voyage "to any port in the *Baltic*," evidence admitted to prove that the *Gulph of Finland* is conſidered in mercantile contracts as within the *Baltic*, although the two ſeas are treated as ſeparate and diſtinct by geographers. *Ubde* v. *Walters*, 16

28. Since the 19th of May 1806, the trading between this country and ports and places in the Iſland of St. Domingo, not under the dominion and in the actual poſſeſſion of his Majeſty's enemies, has been lawful without any licence. *Blackburn* v. *Thompſon*, 61

29. To vacate a policy of inſurance for an infraction of the convoy act, it is not enough to ſhew that the ſhip ſailed without convoy by the inſtrumentality of an agent of the aſſured, unleſs it appear that the agent had authority from his principal for this purpoſe. *Carſtairs* v. *Allnutt*, 497

30. Where goods were inſured "at and from London to Quebec, warranted free of particular average," and the ſhip was driven back from the banks of Newfoundland, and obliged to put into

into Kinſale, where it was impoſſible to repair her ſo as to enable her to complete the voyage the ſame ſeaſon, and the goods, which though not of a periſhable nature, were to a certain degree damaged, could not be forwarded the ſame ſeaſon by any other conveyance;—*held* that the aſſured could not by giving notice of abandonment come upon the underwriters for a total loſs. *Anderſon* v. *Wallis*, 440

31. Where there is an inſurance on ſhip and freight, and the ſhip has arrived in ſafety, and earned freight, the aſſured cannot afterwards claim a return of premium, on the ground that he had no inſurable intereſt, on account of a defect in his title to the ſhip. *M'Culloch* v. *Royal Exchange Aſſurance Company*, 406

32. If a perſon who is not a linen draper, inſures his "ſtock in trade, houſehold furniture, *linen*, wearing apparel, and plate," by a policy againſt fire, this will not protect linen-drapery goods ſubſequently purchaſed on ſpeculation; and the word *linen* in the policy muſt be confined to houſehold linen or linen uſed by way of apparel. *Watchorn* v. *Langford*, 422

INSURANCE BROKER.

1. The authority of a broker employed to effect a policy of inſurance may be revoked after the underwriters have ſigned the ſlip, till ſuch time as they have actually ſubſcribed the policy; and if the broker having procured a ſlip to be written on terms within the ſcope of his original authority, receives an intimation from his principals that they will not ſubmit to theſe terms, and afterwards effects the policy and pays the premiums to the underwriters, he can maintain no action againſt his principals for commiſſion or money paid. *Warwick* v. *Slade*, 127

2. As ſoon as an inſurance broker has received credit in account with an underwriter for a loſs upon a policy, his principal may maintain money had and received againſt him to recover the amount; and in ſuch action, if the underwriter's name is eraſed from the policy, the defendant can neither diſpute the liability of the underwriter for the loſs, nor his own receipt of the ſum ſubſcribed. *Andrew* v. *Robinſon*, 199

3. Inſurance brokers holding a policy for the purpoſe of adjuſting a loſs, ſuffered an underwriter's name to be ſtruck out, upon his ſigning the adjuſtment;—he gave them credit in his books for the loſs, and became bankrupt; but they never took credit for the amount in their books;—on the contrary, they gave the aſſured notice of the bankruptcy, and there was afterwards a ſettlement of accounts between the brokers and the aſſured, comprehending the policy in queſtion, in which no demand was made upon them in reſpect of the bankrupt's ſubſcription.—Ruled, that they were not liable to the aſſured for the ſum due from the bankrupt on the policy. *Ovington* v. *Bell*, 237

4. Inſurance brokers are not liable to an action for neglecting to inſert in a policy a liberty to carry ſimulated papers, if the written inſtructions given them contain no direction for that purpoſe, although it may have been verbally communicated to them that ſimulated papers were to be uſed in the voyage. *Fenin* v. *Oſwell*, 357

5. Where a ſhip was condemned for carrying ſimulated papers, and the policy containing no liberty to do ſo, the aſſured could not recover upon it:—*held*, that an action could not be maintained againſt the inſurance brokers

kers for having neglected to include the premiums and duties, contrary to the inſtructions given them for effecting the policy; as in the reſult the aſſured were not damnified by this neglect. *Fomin* v. *Oſwell*, 357

INTEREST.

See BILLS OF EXCHANGE, 20.

1. Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries intereſt afterwards. *Pinborn* v. *Tuckington*, 468
2. An agent who has advanced money for his principal in effecting inſurances and other mercantile buſineſs, is entitled to charge intereſt, and at the end of every year to make a reſt, and add the intereſt then due to the principal. *Bruce* v. *Hunter*, 467
3. In an action to recover back a depoſit paid on the purchaſe of an eſtate, the vendor not being able to make a good title, if the plaintiff declare ſpecially, and allege as ſpecial damage that he has loſt the uſe of his money; on making out his caſe he will be entitled to intereſt on the depoſit money from the time the purchaſe ſhould have been completed. *De Bernales* v. *Wood*, 258
4. In an action againſt the drawer of a foreign bill of exchange diſhonoured here for non-acceptance, where the plaintiff is allowed a *per-centage* in name of damages, he is only entitled to intereſt from the day when the bill ought to have been paid. *Gantt* v. *Mackenzie*, 51
5. Where there is no allowance for damages, the plaintiff is entitled to intereſt from the day the bill was diſhonoured for non-acceptance. *Harriſon* v. *Dickſon*, 52 *n.*

INTOXICATION.

An agreement ſigned by a perſon in a ſtate of complete intoxication is void. *Pitt* v. *Smith*, 33

JURY.

Where a private act of parliament provides for the expence of *maintaining* the jury ſummoned to aſſeſs the value of property taken under the act, this does not extend to a dinner at a tavern given to the jury after delivering in their verdict. *Forſter* v. *Taylor*, 49

LANDLORD AND TENANT.

See ASSIGNEE OF LEASE. DISTRESS. NOTICE TO QUIT. SHERIFF, 3, 6, 7, 10.

LIBEL.

See WITNESS, 7.

1. An action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely ſpoken. *Thorley* v. *Lord Kerry*, 214
2. A perſon who having a copy of a libellous caricature, ſhews it to another on being requeſted ſo to do, is not thereby liable to an action for maliciouſly publiſhing it. *Smith* v. *Wood*, 323

LICENCE.

See INSURANCE, 10, 11, 12.

1. To treſpaſs for breaking and entering the plaintiff's houſe, and making a noiſe and diſturbance therein, the defendant pleaded a licence, to which the plaintiff replied *de injuria*.—*Held*, that the plea was ſupported by evidence that the plaintiff kept a billiard table in the houſe, at which all perſons were uſually permitted by him to play at regulated prices, and that the defendant entered the houſe for the purpoſe of going to the billiard room, although while in the houſe he

was guilty of a treſpaſs in aſſaulting the plaintiff. *Ditcham* v. *Bond*, 524

LIEN.

See SHIP, 4.

LIMITATIONS, STATUTE OF.

See MONEY HAD AND RECEIVED, 3.

In an action againſt *A.* on the joint and ſeveral promiſſory note of himſelf and *B.* to take the caſe out of the ſtatute of limitations, it is enough to give in evidence a letter written by *A.* to *B.* within the ſix years, deſiring him to ſettle the money. *Hilliday* v. *Ward*, 32

LUNACY.

See EVIDENCE, 2.

A perſon put in to ſuperintend an unlicenſed houſe for the reception of lunatics, is liable to the penalties of 14 Geo. 3. c. 49. without having any ſhare in the profits of the eſtabliſhment. *Budd* v. *Foulks*, 404

MALICIOUS ARREST.

See ARREST, MALICIOUS.

MARRIAGE.

See COVERTURE.

MESNE PROFITS.

Where premiſes are in the poſſeſſion of a tenant, and there is judgement in ejectment againſt the caſual ejector, in an action for meſne profits and coſts of ejectment againſt the landlord, the judgement in ejectment is no evidence againſt him, without proof that he had notice of the ejectment, ſo that he might have come in to defend it; but a ſubſequent promiſe by him to pay the rent and coſts amounts to an admiſſion that he is liable to the action. *Hunter* v. *Britts*, 455

MISNOMER.

See BANKRUPT, 6. TRESPASS.

If the plaintiff declares by a wrong chriſtian name, this is no ground of nonſuit at the trial, if it can be ſhewn that the defendant knew that the action was brought by the perſon who actually ſues. *Boughton* v. *Frere*, 29

MONEY HAD AND RECEIVED.

See BILLS OF EXCHANGE, 12, 22. INSURANCE BROKER, 2. SHERIFF, 1, 3.

1. Money had and received will not lie where the plaintiff upon the ſame tranſaction would be liable to a croſs action to recover damages to an equal amount. *Simpſon* v. *Swan*, 291
2. A receipt ſigned by an agent for his principals is not evidence to ſupport an action for money had and received againſt him to recover the money back. *Edden* v. *Read*, 339
3. Where a ſum of money has been lodged with a party to indemnify him againſt bills of exchange he has accepted for the accommodation of another, an action will not lie againſt him to recover the money while the bills are outſtanding, altho' the ſtatute of limitations has run upon them. *Morſe* v. *Williams*, 418
4. Where a ſervant is in the habit of receiving ſums of money for the uſe of his maſter, and by the eſtabliſhed courſe of dealing, the ſervant pays theſe over to the maſter from time to time, without any written vouchers paſſing between them, the preſumption of law is, that all ſums ſo received by the ſervant are regularly paid over to the maſter; therefore, when there has been ſuch a courſe of dealing, in an action by the maſter againſt

againſt the ſervant for money had and received, it is not enough for the maſter to prove that ſums have been received by the ſervant for his uſe; but the *onus* lies upon him to prove by poſitive evidence, that the ſervant has not duly accounted with him. *Evans* v. *Birch*, 10

MORTGAGE.

See SHIP, 11.

NOTICE OF ACTION.

A local act of parliament provides that no action ſhall be commenced for any thing done *in purſuance* of the act, until after notice of action ſhall have been given.—*Held* that this applies to a caſe where the defendant acted under colour of the act, although he exceeded the powers conferred by it. *Graves* v. *Arnold*, 242

NOTICE TO QUIT.

1. Where a houſe, lands, and tithes are held under a parol demiſe at a joint rent, a notice to quit "the *houſe, lands, and premiſes, with the appurtenances*," includes the tithes, and is ſufficient to put an end to the tenancy. —— *Semble* that although tithes are let by parol, the tenant is entitled to a notice to quit. *Doe d. Morgan* v. *Church*, 71

2. If after the expiration of a notice to quit, the landlord gives the tenant a freſh notice that unleſs he quit in 14 days he will be required to pay double value, the ſecond notice is no waiver of the firſt. *Doe d. Digby* v. *Steel*, 117

3. Where premiſes are taken under an agreement by which the "tenant is always to be ſubject to quit at three months' notice," this conſtitutes a quarterly tenancy, which may be determined by a three months notice to quit, expiring at the ſame time of the year it commenced, or any correſponding quarter day. But although the tenant under ſuch an agreement enters in the middle of one of the uſual quarters, if there appears to be no agreement to the contrary, he will be preſumed to hold from the day he enters; and the tenancy can only be determined by a notice expiring that day of the year, or ſome other quarter day calculated from thence. *Kemp* v. *Derrett*, 510

4. Where a notice to quit, given by a rector to the tenant of his glebe land expired on the 25th of Dec. and on the 17th of Jan. following a ſequeſtration was read in the church, and the rector afterwards by order of the ſequeſtrator received from the tenant, who held over, a weekly allowance, which he deſcribed in a receipt as iſſuing out of the tithe and glebe;—*Held*, that the rector might ſtill maintain an ejectment, laying the demiſe on the 1ſt of Jan. as between the 25th of Dec. and the 17th of Jan. the tenant was a treſpaſſer. *Doe d. Morgan* v. *Bluck*, 447

5. The vendor of a term, before the whole of the purchaſe money is paid, agrees with the purchaſer that the latter ſhall have poſſeſſion of the premiſes till a given day, paying the reſerved rent in the mean time, and that if he does not pay the reſidue of the purchaſe-money on that day, he ſhall forfeit the inſtalments already paid, and ſhall not be entitled to an aſſignment of the leaſe.—The purchaſer being thus put into poſſeſſion, if the reſidue of the purchaſe-money is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit or demand of poſſeſſion. *Doe d. Leeſon* v. *Sayer*, 8

NUISANCE.

See INDICTMENT, 2, 3. WINDOWS.

PARISH.

See INDICTMENT, 11. USE AND OCCUPATION, 1.

PARTNERS.

See BANKERS, 1. BANKRUPT, 5, 14. GUARANTIE, 3.

Where one of ſeveral partners, with the privity of the others, draws bills of exchange in his own name upon the partnerſhip firm, in favour of perſons who advance him the amount, which he applies to the uſe of the partnerſhip, altho' the partners are not jointly liable on the bills, they may be jointly ſued by the payees for money lent. *Denton* v. *Rodie*. 493

PAYMENT OF MONEY INTO COURT.

1. In an action on a bill of exchange after payment of money into court, the defendant cannot object to the ſufficiency of the ſtamp on which the bill is drawn. *Iſrael* v. *Benjamin*, 40
2. Payment of money into court can only be proved by the rule for paying it in. *Iſrael* v. *Benjamin*, 41

PERJURY.

See SURROGATE.

PEW.

See EVIDENCE, 4.

PLEADING.

See ASSUMPSIT. BANKRUPT, 8.

1. If an action on a promiſſory note made and dated in a foreign country, the declaration, without noticing that circumſtance, may allege that it was made in the county in which the venue is laid. *Houriet* v. *Morris*, 304
2. If the owner of a horſe lets him to hire for a certain time, during which he is killed by the owner of a cart driving it violently againſt him, the remedy of the owner of the horſe againſt the owner of the cart is *caſe* and not *treſpaſs*. *Hall* v. *Pickard*, 187
3. If *A*. obtains a warrant againſt *B*. directed to *C*. and *D*. as conſtables, and voluntarily aſſiſts them in executing it, to treſpaſs and falſe impriſonment brought by *B*. againſt the three others, *A*. as well as *C*. and *D*. may plead the general iſſue and give the ſpecial matter in evidence. *Nathan* v. *Cohen*, 257
4. Where the burthen of repairing a highway is transferred by a public act of parliament from the pariſh to other perſons, if the pariſh be indicted for not repairing this highway, there is no occaſion for a ſpecial plea, ſtating who are bound to repair it, but the exemption may be taken advantage of under the general iſſue, of *Not Guilty*. *Rex* v. *St. George's Hanover Square*, 222

POLICY.

See INSURANCE.

PRACTICE.

1. In ejectment, where the leſſor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the queſtion between them, the defendant on admitting the title of the leſſor of the plaintiff under the will, has a right to begin and to have the general reply. *Doe d. Sir Ric. Corbett Bart.* v. *Corbett*, 368
2. In treſpaſs quare clauſum fregit, if the defendant pleads—as to coming with force and arms and whatſoever elſe is againſt the peace, *not guilty*, and as to the reſidue of the treſpaſſes, a juſtification, which is denied by the replication; at the trial he has a right to begin and to have the general reply. *Hodges* v. *Holder*, 366

5. At the aſſizes, if buſineſs is not begun on the commiſſion day, cauſes muſt be entered with the marſhal before the ſitting of the court on the firſt day of buſineſs. *Skeye* v. *Voyce*, 365
4. Refuſal to certify for ſpecial jury, on application made the day after the trial. *Waggett* v. *Shaw*, 316
5. At niſi prius in K. B. the plaintiff cannot apply to put off the trial of his cauſe from ſittings to ſittings, but may from one day in the ſittings to another. *Anſley* v. *Birch*, 333
6. A judge ſitting at niſi prius at Weſtminſter cannot upon motion make an order in a cauſe entered for trial in London. *Atkinſon* v. *Dickinſon*, 41
7. On the trial of a miſdemeanor, the defendant cannot have the aſſiſtance of council to examine the witneſſes, and reſerve to himſelf the right of addreſſing the jury: but if he conducts his defence himſelf, and any point of law ariſes which he profeſſes himſelf unable to argue, the Court will hear this argued by his counſel. *Rex.* v. *White*, 98

PRECEDENCE.

Attorney and Solicitor General to have precedence, above all the King's ſerjeants, xii

PREMIUM, RETURN OF.

See INSURANCE, 31.

PRINCIPAL AND AGENT.

See ACTION, 3. AUCTIONEER. BROKER. FACTOR. INSURANCE BROKER.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY TAX.

See USE AND OCCUPATION, 2.

REGISTER.

See SHIP, 7, 8, 9.

REPRESENTATION.

See INSURANCE, 13.

SALE.

See SHIP, 1, 2. ASSUMPSIT, INDEBITATUS, 2. BROKER. FRAUDS, STATUTE OF.

1. Where goods are ſold by a written contract, which contains a deſcription of their quality, without referring to any ſample, if the goods do not correſpond with that deſcription, it is not material for the vendor to ſhew that they correſpond with a ſample exhibited at the time of ſale to the purchaſer, who was well ſkilled in the commodity, this not being a ſale by ſample, but by the deſcription in the written contract. *Tye* v. *Fynmore*, 462
2. If a written contract for the ſale of goods ſpecifies no time for delivering them, in an action for not delivering them, it is not competent for the defendant to give parol evidence that it was a condition of ſale that the goods ſhould be taken away immediately, or that by the uſage of trade where goods are ſold to be delivered at a diſtant day, the time is always mentioned in the written contract. Although the purchaſer of goods neglects, after notice, to carry them away, the ſeller has no right on that account to re-ſell them. *Greaves* v. *Aſhlin*, 426
3. Where a perſon in the country gives an order to a tradeſman in London with whom he has been in the habit of dealing, to ſend him down *more goods* by a particular coach, and at the office of this coach there is a notice ſtuck up, intimating that the proprietors will not be anſwerable for goods above the value of 5l. unleſs inſured, it is enough for the vendor

to deliver the goods ordered at this office, although they be above the value of 5l. without inſuring them, unleſs he has inſured for the purchaſer in former inſtances. *Cothay* v. *Tute*, 129

4. Contract in London for the ſale of tallow from a particular ſhip, on arrival—to be taken from the king's landing ſcale—if it ſhould not arrive on or before a given day, the bargain to be void: The ſhip was wrecked off the coaſt of Scotland; but the cargo was ſaved, and might have been forwarded to the port of London by the given day: The vendors reſold the tallow in Scotland: The purchaſers did not offer them any indemnity if they would bring the tallow to London.—*Held*, that under theſe circumſtances, the vendors were not anſwerable for the non-delivery of the tallow. *Idle* v. *Thornton*, 274

5. A delivery of goods at a wharf is not ſufficient to charge the purchaſer, unleſs the ſeller procures them to be booked, or takes a receipt for them, or delivers them in ſuch a manner as to furniſh a remedy over againſt the wharfinger. *Buckman* v. *Levi*, 414

6. Where, in a contract for ſale of ſugar, there is the following term: "free on board a foreign ſhip," the ſeller is not bound to deliver it into the hands of the purchaſer, or to tranſfer it into his name in the books of the warehouſe where it lies, but only to put it on board a foreign ſhip, which it is the duty of the purchaſer to name. *Waterhouſe* v. *Maſſie*, 270

7. In the conditions of ſale of the leaſe of a public houſe, it was deſcribed as "a free public houſe;" the leaſe contained a covenant that the leſſee and his aſſigns ſhould take their beer from a particular brewer; this leaſe was all read over by the auctioneer at the time of the ſale, who ſaid miſtakenly that it was *a free public houſe*, and that the covenant about the beer had been decided to be bad.—*Held*, that the purchaſer who heard the leaſe read over, was not bound under theſe circumſtances to complete the purchaſe, but was entitled to recover back the depoſit. *Jones* v. *Edney*, 285

8. The purchaſer of goods to be paid for by bill upon his agent, is not diſcharged by the ſeller taking a renewal of the bill without giving him notice, if the agent had not funds in hand to pay the bill when it became due. *Clarke* v. *Nori*, 411

SAMPLE.

See SALE, 1.

SCRIVENER.

See BANKRUPT, 1.

SEAMEN'S WAGES.

1. During a voyage the ſhip is wrecked, the captain gives the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging at the ſame time that he had hired them by the month.—*Held*, that under theſe circumſtances, no action for wages could be maintained by the mariners againſt the captain, at leaſt without proving that they had firſt made a demand upon the owners. *Forſbeom* v. *Kruger*, 197

2. Stat. 2. Geo. 2. c. 36. requiring articles to be entered into between the maſters of ſhips and the mariners, and providing that the mariners ſhall not fail in any ſuit for wages from not producing the articles, does not apply to the caſe of a Britiſh ſeaman entering on board a foreign ſhip in a Britiſh port. *Dickman* v. *Benſon*, 290

3. If foreign ſailors ſtipulate in their own country before the commencement of a voyage, that they will not ſue the captain for any money abroad, but be ſatisfied with what he may advance

vance them in deduction of their wages till they return home, they cannot maintain an action againſt him for wages, in the courts in this country. *Johnſon* v. *Mackielſon*, 44

SEDUCTION.

See WITNESS, 8, 9.

SET OFF.

1. Where goods are ſold, to be paid for by a bill of exchange at a given date, to an action commenced within that time for refuſing to give ſuch bill, the defendant cannot ſet off a debt due to him from the plaintiff. *Hutchinſon* v. *Reid*, 329
2. In an action by the aſſignees of a bankrupt, it is not ſufficient proof of a ſet-off, that the commiſſioners permitted the defendant to prove the debt propoſed to be ſet off under the commiſſion. *Pirie* v. *Mennett*, 279

SHERIFF.

See TROVER, 4.

1. After a return to a writ of *fi. fa.* that the money is levied, the ſheriff is liable to an action for money had and received, without any demand of payment. *Dale* v. *Birch*, 347
2. The ſheriff cannot maintain an action for the expence incurred in ſeizing and keeping poſſeſſion of goods under a *fi. fa.* at the requeſt of the party ſuing out the writ, although they are not ſold, on account of his refuſing to give an indemnity againſt the claims of third perſons. *Bilke* v. *Havelock*, 374
3. An action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent againſt the ſheriff, who has ſold his tenant's goods under an execution. *Green* v. *Auſtin*, 269
4. In an action againſt the ſheriff for a falſe return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to ſhew that this officer's name is written in the margin of the examined copy of the writ and return. But without producing the warrant, it was held to be enough to give in evidence a paper iſſued by the ſheriff's office and directed to this officer, requiring him to give inſtructions for making a return to the writ. *Jones* v. *Wood*, 228
5. In an action againſt the ſheriff for an eſcape upon meſne proceſs, it is enough, without producing the warrant, or giving direct evidence of the arreſt or eſcape, to prove the ſheriff's return of cepi corpus, and to ſhew that the party did not put in bail, and was not in the ſheriff's cuſtody at the return of the writ. *Fairlie* v. *Birch*, 397
6. In an action againſt the ſheriff for an improper return to a fi. fa. which ſtated that he had paid a ſum of money to the landlord of the premiſes for arrears of rent, it is not enough for him to prove that he paid the money to the landlord; but he ſhould adduce ſome evidence that the rent was due. *Keightley* v. *Birch*, 521
7. For this purpoſe, the landlord of the premiſes is not a competent witneſs. *Ib.*
8. The ſheriff having taken goods in execution under a fi. fa. is not juſtified in ſelling them to the higheſt bidder greatly under their value; but if he cannot obtain a reaſonable price, ſhould return that they remain in his hands for want of buyers. *Keightley* v. *Birch*, 521
9. It is not a ſufficient juſtification to the ſheriff for refuſing to execute proceſs, that the individual againſt whoſe perſon or goods it iſſues has the appointment of domeſtic ſervant to a foreign miniſter at our court, and that notice of this has been ſtuck up at the ſheriff's office, unleſs the appointment

ment be *bona fide*; and in an action againſt the ſheriff for a falſe return, the plaintiff may ſhew the appointment is merely colourable. *Delvalle* v. *Plomer*, 47

10. If upon the goods of a tenant being taken in execution, an agent of the landlord takes from the ſheriff's officers an undertaking for a year's rent, and then conſents to the goods being ſold, the landlord cannot afterwards maintain an action againſt the ſheriff on 8 Ann. c. 11. § 1. for not paying a year's rent on making the levy; although the rent is not paid according to the undertaking, and although the undertaking ſhould be void under the ſtatute of frauds for not ſtating any conſideration. *Rothery* v. *Wood*, 24

SHIP.

See ACTION, 3. AVERAGE. SEAMEN'S WAGES.

1. If a ſhip is ſold *with all faults*, the ſeller is not liable to an action in reſpect of latent defects which he knew of without diſcloſing at the time of the ſale, unleſs he uſed ſome artifice to conceal them from the purchaſer. *Baglehole* v. *Walters*, 154

2. Although a ſhip be ſold, "to be taken with all faults," the vendor cannot avail himſelf of that ſtipulation, if he knew of ſecret defects in her, and uſed means to prevent the purchaſer from diſcovering them, or made a fraudulent repreſentation of her condition at the time of the ſale. *Schneider* v. *Heath*, 506

3. Where the charterer of a ſhip for a voyage to Tobago and back, covenanted to load and diſpatch her in time to join the convoy that ſhould be appointed to ſail from the Weſt Indies on the 1ſt of Auguſt;—*held* that he was liable for not having loaded and diſpatched her by the 22d of July, the day the Weſt India convoy paſſed the Iſland of Tobago, although he offered to load her with a complete cargo if ſhe would ſtop a few days longer. *Thompſon* v. *Inglis*, 428

4. The maſter of a ſhip has no right to detain goods for wharfage, if the conſignee tenders the freight, and requires them to be delivered over the ſhip's ſide. *Biſhop* v. *Ware*, 360

5. Where a ſhip was freighted to go in ballaſt to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her, in time for the July convoy provided ſhe arrived out and was ready by the 25 June;—*held*, that as ſhe did not arrive out till after the 25 June the freighter was entirely diſcharged from his contract to furniſh a cargo. *Shadforth* v. *Higgin*, 385

6. Where the charterer of a ſhip to Jamaica and back, covenanted to load her there with a complete cargo of ſugar and to pay freight for the ſame at the rate of 10s. 6d. per cwt. and his agent at Jamaica tendered a complete cargo to the captain, but inſiſted on his ſigning bills of lading for it at 10s. per cwt. which the captain refuſed to do;—*Held*, that the charterer was liable for dead freight. *Hyde* v. *Willis*, 202

7. In an action for ſtores ſupplied to a ſhip, if the defendant pleads in abatement that he is only liable jointly with others, it is not enough for him to produce the ſhip's regiſter, containing the names of himſelf and thoſe others as owners of the ſhip. *Flower* v. *Young*, 240

8. In an action againſt the owner of a ſhip for ſtores ſupplied to her, the regiſter purporting to be granted on the oath of the defendant, and ſtating him the ſole owner, is no evidence of ownerſhip. *Smith* v. *Fuge*, 456

9. To prove that a ſhip is Britiſh-built, a Britiſh regiſter ſo deſcribing her is by itſelf no evidence. *Reuſſe* v. *Meyers*, 475

10. A ſhip was deſcribed in a memorandum for charter as "the Swediſh ſhip or veſſel called the Maria." In fact ſhe was Britiſh-built, and had a Britiſh regiſter, but ſhe had a complete ſet of Swediſh papers and a treaſury licence to ſail as a Swediſh ſhip, which particulars were known to the freighter: —*Held*, that in an action againſt him for not loading and diſpatching the ſhip according to the memorandum for charter, he could not ſet up as a defence that ſhe was in point of fact a Britiſh and not a Swediſh ſhip. *Reuſſe* v. *Meyers*, 475

11. Where a ſhip is mortgaged, but the mortgagor continues in poſſeſſion, the maſter employed by him cannot maintain an action for wages and diſburſements againſt the mortgagee. *Annett* v. *Carſtairs*, 354

12. If the maſter of a ſhip in a foreign port, from the ſtate of the exchange receives a premium for a bill drawn upon England on account of the ſhip, this belongs to his owner, although there may have been a uſage for maſters of ſhips to appropriate ſuch premiums to their own uſe. *Diplock* v. *Blackburn*, 43

13. If the captain of an Eaſt Indiaman dies at the outward port after having contracted to bring home certain paſſengers, and laid in a certain quantity of ſtores for the homeward voyage; and the chief mate ſucceeding to the command brings home theſe and other paſſengers, and provides further ſtores for their ſubſiſtence during the voyage; the captain's repreſentatives are entitled to the paſſage money of the paſſengers with whom he had contracted, and the mate to that of the others;—the repreſentatives being liable to him for the portion of the ſtores laid in by him conſumed by the former claſs of paſſengers, and he being liable to the repreſentatives for the portion of the captain's ſtores conſumed by the latter claſs of paſſengers. *Siordet* v. *Brodie*, 253

14. Where a ſhip is chartered by a charter-party under ſeal, which provides ſpecifically for the payment of freight from the charterer to the owner, a perſon who receives goods carried by the ſhip in this voyage as indorſee of the bill of lading which makes them deliverable to order or to aſſigns on payment of freight as per charter-party, is liable to pay freight to the charterer accordingly; although he has paid over the proceeds of the goods to the perſon who indorſed the bill of lading to him, before being called upon to pay the freight. *Bell* v. *Kymer*, 545

SLANDER.

See WORDS. LIBEL.

SOUTH SEA COMPANY.

Semble that after a ſhip has ſailed on a voyage to a place within the limits of the S. S. Company, a retroſpective licence granted by the company, is inſufficient to legalize the voyage. *Hobbs* v. *Hannam*, 95

STAMPS.

See APPRENTICE, 1. BILLS OF EXCHANGE, 24. PAYMENT OF MONEY INTO COURT, 1.

1. Although a policy of inſurance produced at the trial of an action has a ſufficient ſtamp, evidence will be received that it had no ſuch ſtamp when it was effected, in which caſe it is a mere nullity, though ſtamped afterwards by order of the commiſſioners of ſtamps; for this is forbidden by 35 G. 3. c. 63., and not authorized by 37 G. 3. c. 136. which extends only to ſuch inſtruments as could before be legally ſtamped after they were executed. *Roderick* v. *Hovil*, 103

2. If a ſtamp is neceſſary to the validity of

of an agreement made in a foreign country, an agreement made there, unleſs it has ſuch ſtamp, cannot be received in evidence in our courts of juſtice. But it is incumbent upon the party who objects to the validity of the agreement, to prove the law requiring the ſtamp, by an authenticated copy, if it be in writing, and if not, by the teſtimony of a witneſs acquainted with the laws of the foreign country. *Clegg* v. *Levy*, 166

3. A receipt for taxes ſigned by a clerk of the deputy receivers-general of a county in their name, may be given in evidence without a ſtamp. *Edden* v. *Read*, 338

4. A. and B. for a debt due to C. agree to give him a bill of exchange to be drawn by A. and accepted by B.—Inſtead of this, they ſend him a promiſſory note made by the one and indorſed by the other, which he immediately returns to be altered into a bill of exchange according to the agreement.—The inſtrument ſo altered is a valid bill of exchange, without a freſh ſtamp, as it had not been negotiated in the ſhape of a promiſſory note, and the alteration may be conſidered as the mere correction of a miſtake. *Webber* v. *Maddocks*, 1

5. An accommodation bill payable to the drawer's order cannot be altered after acceptance and an attempt to negotiate it, and before it is actually negotiated. *Calvert* v. *Roberts*, 343

6. Q. Whether a 2s. ſtamp be ſufficient for a bill for "50*l. with all legal intereſt.*" *Iſrael* v. *Benjamin*, 40

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48. c. 141. (Stamp Receipt) 339

49. c. 121. (Sir S. Romilly's Act) 251. 308. 424

50. c. 149. (St. Luke's. Middleſex) 242

SUGAR.

See SALE, 6.

SURROGATE.

Upon an indictment for perjury before a ſurrogate in the eccleſiaſtical court, the fact of the perſon who adminiſterd the oath having acted as a ſurrogate, is ſufficient primâ facie evidence of his being duly appointed, and having authority

authority to adminiſter the oath. But if it appear that the ſurrogate was appointed contrary to the canon, which requires that no judicial act ſhall be ſpeeded by any eccleſiaſtical judge, unleſs in the preſence of the regiſtrar or his deputy, or other perſons by law allowed in that behalf, his appointment is a nullity, and the averment that he had authority to adminiſter the oath is negatived. *Rex* v. *Vereſt*, 432

TAVERN.

See WAGER, 2.

1. Where a party of ſeveral perſons dine together at a tavern, they are jointly liable for the whole expence, and not merely each for his own ſhare. *Forſter* v. *Taylor*, 49
2. But the officers of a regimental meſs are only ſeparately liable, each for his own ſhare. *Brown* v. *Doyle*, 51 *n.*

TENDER.

It is not a good tender of a fractional ſum, for the debtor to offer the creditor a bank note to a larger amount, and to deſire him to take out of that the ſum to be paid. *Betterbee* v. *Davis*, 70

TITHES.

See NOTICE TO QUIT, 1.

TRADER.

See BANKRUPT, 1, 2.

TRESPASS.

See PLEADING, 2, 3.

If a perſon whoſe real name is William, is aſked, before proceſs iſſues againſt him, whether his name is not John, and he ſays it is, he cannot maintain treſpaſs for what is done in execution of the proceſs againſt him by the wrong name. *Price* v. *Harwood*, 108

TRIAL.

See INDICTMENT, 6.

TROVER.

See BILL OF LADING.

1. Refuſal to deliver goods, by perſon ignorant of real owner, no evidence of converſion. *Green* v. *Dunn*, 215 *n.*
2. The plaintiff exchanged a watch with the defendant for a pair of candleſticks, which the latter warranted to be ſilver.—*Held*, that the plaintiff could not maintain trover for the watch, on proof that the candleſticks were of baſe metal. *Emanuel* v. *Dunn*, 299
3. *A.* paid a Bank of England note to *B.*, who paid it to *C.*, who preſented it at the Bank, where it was ſtopped, on the ground that it had been fraudulently obtained from a former holder. —*Held*, that although *A.* thereupon paid the amount of the note to *C.*, in diſcharge of the debt due to him from *B.*, *A.* could not maintain trover for the note againſt the Bank of England. *Benjamin* v. *Bank of England*, 417
4. Where after a ſecret act of bankruptcy the ſheriff took in execution the goods of a trader under a fi. fa., and removed them to a broker's, and the aſſignees of the bankrupt afterwards ſerved a notice upon him not to ſell them; for which reaſon they were allowed to remain unſold at the broker's;—*Held*, that the ſheriff was liable to an action of trover at the ſuit of the aſſignees, without any demand of the goods. *Wyatt* v. *Blades*, 396
5. In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and intereſt due upon the bill at the time of the converſion. *Mercer* v. *Jones*, 477

VARIANCE.

See BILLS OF EXCHANGE, 1, 3. USE AND OCCUPATION, 1.

VENDOR AND PURCHASER.

See SALE.

VENUE.

See APPRENTICE, 3. PLEADING, 1. USE AND OCCUPATION, 1.

USE AND OCCUPATION.

1. In an action for use and occupation, although it be unneceſſary to ſtate in the declaration in what pariſh the premiſes are ſituate, if this is alleged, a variance in the name of the pariſh is fatal. *Gueſt* v. *Caumont*, 235
2. In an action for uſe and occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial. *Baker* v. *Davis*, 474
3. Where premiſes are let at an entire rent, an eviction from part, if the tenant thereupon gives up poſſeſſion of the reſidue, is a complete defence to an action for uſe and occupation. *Smith* v. *Raleigh*, 513

USURY.

1. If an uſurious ſecurity be given for a legal ſubſiſting debt, although the ſecurity is void, the debt is not extinguiſhed. *Phillips* v. *Cockayne*, 119
2. An agreement that London bankers ſhould accept and pay bills of exchange drawn in the country for a commiſſion of 5s. per cent. being furniſhed with funds to pay the bills before they became due, cannot be uſurious, there being no contemplation of an advance of money. If upon ſuch an agreement an advance of money were contemplated, it would be a queſtion of fact, whether the commiſſion was a ſhift to obtain more than legal intereſt for the forbearance, or a compenſation for the trouble and expence incurred in accepting and paying the bills of exchange. *Maſterman* v. *Cowrie*, 488

WAGER.

1. An action may be maintained upon a wager of *a rump and dozen*, whether the defendant be older than the plaintiff. *Huſſey* v. *Crickitt*, 168
2. When a dinner is ordered at a tavern by the authority of two perſons who have laid a wager of *a rump and dozen*, if the winner pays the bill, he may maintain an action againſt the loſer for *money paid* to recover the amount. *Huſſey* v. *Crickitt*, 168
3. No action can be maintained upon a wager on a cock fight. *Squires* v. *Whiſken*, 140

WALES.

Stat. 26 Hen. 8 c. 6. authorizing the trial of felonies committed in Wales, in the next adjoining Engliſh county, extends to felonies ſubſequently created. *Rex* v. *Window*, 78

WARRANTY.

See INSURANCE. SHIP, 1, 2. TROVER, 2.

Where a cuſtomer who had bought a quantity of burgundy of excellent quality from a wine merchant, ſome time after procured him to exchange a portion of it for wine of a different deſcription;—*held*, that there was no implied warranty on the part of the cuſtomer as to the ſtate of the wine at the time of the exchange, and that although it had then become quite ſour, the wine merchant had no remedy, without proof that the other knew its deteriorated condition, and intended to practiſe a fraud. *La Neuville* v. *Nourſe*, 351

WHARFAGE.

See SHIP, 4.

WINDOWS.

WINDOWS.

1. If an antient window be raiſed and enlarged, the owner of the adjoining land cannot lawfully obſtruct the paſſage of light and air to any part of the ſpace occupied by the antient window, although a greater portion of light and air be admitted through the unobſtructed part of the enlarged window than was antiently enjoyed. *Chandler* v. *Thompſon*, 80
2. If an antient window has been completely ſhut up with brick and mortar above twenty years, it loſes its privilege. *Lawrence* v. *Obee*, 514
3. An action for a nuiſance to a houſe cannot be maintained for that which was no nuiſance to the houſe before a new window was opened in it by the plaintiff, and which becomes a nuiſance only by that act. *Lawrence* v. *Obee*, 514

WITNESS.

See ATTESTING WITNESS. SHERIFF, 7.

1. An underwriter who pays on a promiſe of re-payment if the policy be determined to be invalid, is not a competent witneſs for another underwriter who diſputes the loſs. *Aliter*, if the promiſe of repayment had been made after he had paid unconditionally, or if the plaintiff had fraudulently entered into the agreement with him for the purpoſe of taking off his teſtimony. *Forreſter* v. *Pigou*, 380
2. In an action for goods ſold, a perſon who entered into a contract for the purchaſe of the goods in his own name, is not a competent witneſs to prove that he purchaſed them as the agent of the defendant. *M'Brain* v. *Fortune*, 317
3. In ejectment on the ſeveral demiſes of two perſons, although the evidence ſhews the title to be excluſively in one of them, the other cannot be compelled to be examined as a witneſs for the plaintiff. *Fenn* d. *Pewtriſs* v. *Granger*, 177
4. Where, in an action againſt two defendants, one pleads his bankruptcy, and the other the general iſſue, the former cannot, on proof of his certificate, be made a witneſs for the latter. *Currie* v. *Child*, *Pritchard*, *and Brown*, 283
5. A carrier employed by *A.* firſt to carry a ſum of money to *B.* and then the like ſum to *C.*, in an action by *A.* againſt *C.* is a good witneſs from neceſſity to prove that by miſtake he delivered the firſt ſum to *C.* as well as the ſecond. *Barker* v. *Macrae*, 144
6. In an action by the ſheriff on a bail bond, the bound bailiff who made the caption is a competent witneſs to prove the execution of the bond, if the defendant knowing his ſituation aſked him to become atteſting witneſs. *Honeywood* v. *Peacock*, 196
7. In an action for a libel in the ſhape of an extrajudicial affidavit ſworn before a magiſtrate, a perſon who acted as the magiſtrate's clerk is not bound to anſwer whether by the defendant's orders he wrote the affidavit and delivered it to the magiſtrate, as he might thereby criminate himſelf. *Maloney* v. *Bartley*, 210
8. In an action for ſeducing the plaintiff's daughter *per quod ſervitium amiſit*, the daughter is not bound to anſwer in croſs examination whether ſhe had not been previouſly criminal with other men. *Dodd* v. *Norris*, 519
9. In ſuch an action evidence cannot be admitted that the defendant accompliſhed the ſeduction by means of a promiſe of marriage. Nor does the mere croſs-examination of the daughter to ſhew that ſhe had been guilty of improper conduct, entitle the plaintiff to call other witneſſes to her character. *Dodd* v. *Norris*, 519
10. Notwithſtanding the oath adminiſter-

ed to a collector of the property tax by the commiſſioners, that he will not diſcloſe any thing he learns in that capacity, except with their conſent, or by virtue of an act of parliament, he is bound when ſubpœnaed as a witneſs, to give evidence of all facts within his knowledge touching the matter in queſtion. *Lee q. t.* v. *Birrell*, 337

11. Where to treſpaſs for breaking through the wall of the plaintiff's houſe, the defendant pleaded a licence, to which the plaintiff now aſſigned *exceſs*; it appeared that the plaintiff had given the defendant leave to do what was neceſſary for repairing his own houſe, which adjoined the plaintiff's; and it was held, that the workmen employed to do the repairs were competent witneſſes for the defendant to diſprove the exceſs, without a releaſe. *Cuthbert* v. *Goſling*, 515

12. It is no ſufficient ground for receiving evidence of the hand-writing of a witneſs which would be receivable if he were dead, that he is unable to attend the trial from indiſpoſition, and lies without hopes of recovery. *Harriſon* v. *Blades*, 457

13. Upon an iſſue to try the validity of a commiſſion of bankrupt, a creditor is not a competent witneſs to ſupport the commiſſion, although he does not appear to have proved under it. *Adams* v. *Malkin*, 548

WORDS.

See LIBEL.

1. An action for defamation cannot be maintained againſt a man whoſe property has been ſtolen, and who upon reaſonable grounds of ſuſpicion charges an innocent perſon with having ſtolen it. *Fowler* v. *Homer*, 294

2. In an action for words which may be underſtood to convey a charge either of felony or fraud, although they would be actionable in the latter ſenſe as well as the former, if the declaration contains an innuendo that the defendant thereby meant to impute felony to the plaintiff, this is material, and muſt be made out in evidence. *Smith* v. *Carey*, 461

END OF THE THIRD VOLUME.

Printed by A. Strahan, Law-Printer to His Majeſty,
Printers-Street, London.

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